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CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXXX.

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AMERICAN STATE REPORTS.

VOL. LXXX.

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(22)

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

GATZOW v. BUENING.

[106 Wis. 1, 81 N. W. 1003.]

TRIAL BY JURY—BASIS FOR CHALLENGE.—In impaneling a jury called to try an action, defended upon the ground that the acts complained of were done in pursuance of the by-laws of a liverymen's union, to which the defendants belonged, the jurors may properly be asked, as a basis for challenge, whether they are biased against unions.

TRIAL—IMPANELING JURY—WAIVER OF OBJECTIONS. A failure to object to a collected jury waives any objections to the improper exclusion of questions put to them on their examination.

DAMAGES—ACTION FOR—NOTICE OF, WHEN UNNECESSARY.—Notice of an action for the loss of money and injury to the feelings, caused by an unlawful conspiracy and the acts done pursuant thereto, is not necessary under the Wisconsin statute, requiring notice to be given of an action to recover damages for an injury to the person, as the statute refers to bodily injuries and such action is not within it.

ACTIONS—TORT—BREACH OF CONTRACT.—An action is not one for breach of contract, but sounds in tort, where the complaint sets forth a conspiracy to commit a wrong, and acts pursuant thereto, to the special injury of the plaintiff.

UNLAWFUL COMBINATIONS—LIVERYMEN'S ASSOCIATION—STIFLING COMPETITION IN BUSINESS.—A combination of liverymen to limit their services to persons patronizing them exclusively, and to monopolize the livery business in a particular city, including such service for the burial of the dead, and to carry prices to, and maintain them at, such a level as the combination may see fit to adopt, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, is clearly unlawful as against public policy.

PUBLIC COMBINATIONS.—IF AN UNLAWFUL COMBINATION EXISTS, IT IS NONE THE LESS UNLAWFUL because existing under a self-imposed constitution and governed by by-laws,

and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests.

UNLAWFUL COMBINATIONS—LIVERYMEN'S ASSOCIATION—ACTION FOR DAMAGES—DEFENSE.—In a proceeding for damages for wrongdoing by an unlawful combination of liverymen to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy.

UNLAWFUL COMBINATIONS AND UNLAWFUL ACTS DONE PURSUANT THERETO—LIVERYMEN'S ASSOCIATION.—If a member of a liverymen's association lets a hearse and carriage to a customer to be used at the funeral of the latter's child, but, upon learning that the person in charge is an undertaker and liveryman doing an independent business, joins with the secretary of the association, in accordance with its rules, in sending the vehicles away from the customer's house just as they are about to be used and when another hearse cannot be supplied, and for the purpose of demonstrating the power of the association to punish independent liverymen and persons dealing with them, such acts are unlawful, and the wrongdoers are answerable for both actual and exemplary damages.

UNLAWFUL COMBINATIONS—UNLAWFUL ACTS—RESTRAINT OF TRADE.—While a combination of persons, to restrict legitimate trade or commerce in any field, may not interfere with trade or individual freedom, yet overt, unlawful acts by two or more of its members, acting by agreement to carry out its purposes, will render the combination, as to them, unlawful.

TRIAL.—THE RIGHT TO A SPECIAL VERDICT IS ABSOLUTE, under the Wisconsin statute, if requested before argument to the jury, and it is the duty of the trial court to prepare its form. Hence, if a special verdict is requested, before any argument to the jury, it is error for the court to shift such duty to the moving party and then to deny his motion as coming too late, where it is renewed at the close of argument and questions are submitted for the approval of the court.

TRIAL—DENIAL OF REQUEST FOR SPECIAL VERDICT. It is not material error, when the facts admitted or established beyond reasonable controversy by the evidence leave nothing to submit to the jury except the amount of the damages, to deny a request for a special verdict.

DAMAGES—"ACTUAL" AND "COMPENSATORY"—MEANING OF.—The term "compensatory damages" covers all loss recoverable as a matter of right, and is synonymous with the term "actual damages." Pecuniary loss is actual damage; so is bodily pain and suffering.

DAMAGES IN A TORT ACTION ARE NOT DIVIDED into actual, compensatory, and exemplary. The jury should be told that full compensatory damages are recoverable, and then be instructed as to their elements.

DAMAGES—DISCRETION OF JURY.—When guilt is established in a tort action, the allowance of exemplary damages is in the discretion of the jury, but the allowance of compensatory damages is not a matter in their discretion.

DAMAGES—TORT ACTION—INJURY TO FEELINGS.—Mental distress is not a subject for the assessment of damages in a tort action where there was no physical injury to the plaintiff, and no personal injury to him of any kind save to his feelings.

Action for damages for injuries caused by an alleged unlawful conspiracy and acts done pursuant thereto. It appeared from the allegation of the complaint that the plaintiff, Gatzow, had hired from the defendant, Schubert, a liveryman, a hearse and carriage to be used at the funeral of the plaintiff's child, in the city of Milwaukee, and had paid eight dollars for the use of the vehicles; that Schubert and the other defendant, Buening, with a malicious design to humiliate and injure the plaintiff, entered into an agreement to deprive him of the use of the hearse and carriage and to cause them to be taken away from his residence at about the instant they would be needed to convey the child's body and attending friends to the grave; and that they carried out such design, thereby causing the plaintiff great mental distress, besides the loss of the amount paid by him. It appeared that there existed in Milwaukee a liverymen's union, of which Buening was secretary and Schubert a member; that one of its purposes was to compel every liveryman to belong to it or go out of business, to prevent competition between liverymen, and to hold up the prices to such a level as the union might see fit to fix; that one of the by-laws of such association prohibited, under penalty, any member thereof from furnishing vehicles of any kind to any liveryman who hired out vehicles at less than the association's prices; that one Nieman, a liveryman and undertaker, who had charge of the child's funeral, was not a member of the liverymen's association, but did an independent business; that Nieman, on such occasion, as he was in the habit of doing, furnished vehicles at lower prices, and paid his employes less, than the association permitted; that, according to the by-laws of the association, no member thereof was allowed to do business with any person who did not patronize its members exclusively, or to let a hearse to a private party for a funeral where the undertaker in charge of it was reputed to patronize nonunion members, or to any person whose family, for the occasion, patronized a nonunion livery; that on the occasion in question, the plaintiff employed Nieman to obtain the carriage and hearse for him, and that the engagement of the hearse and carriage of the defendant Schubert was made through Nieman in the name of the plaintiff and without Schubert's knowing that Nieman was in any

way concerned in the transaction, the business having been done with one of Schubert's employés. Fearing that the transaction might lead to a violation of the rules of the association, Schubert directed the driver of the hearse not to remain at the funeral if a nonunion man was in charge; and after the hearse and carriage left Schubert's barn to attend the funeral, Buening, being informed of the facts, communicated with Schubert's place of business, with the result that the hearse and carriage were taken away from the plaintiff's residence. All allegations of the complaint regarding an agreement between Buening and Schubert were denied by the latter, and the former, in his answer, pleaded that it was his duty, as secretary of the association, to do what he did, and that he merely performed it without any specific agreement with Schubert to injure the plaintiff, and without malice toward him. There was a verdict for the plaintiff. A motion to set aside the verdict, and for a new trial, upon all the grounds discussed in the opinion, was denied, and the defendants appealed from a judgment rendered upon the verdict.

O'Connor, Hammel & Schmitz and A. J. Schmitz, for the appellant, Schubert.

W. B. Rubin, for the appellant, Buening.

R. N. Austin, for the respondent.

10 MARSHALL, J. Questions put to jurymen during the impaneling of the jury as to their being biased against unions were improperly excluded. That was a legitimate subject of inquiry leading up to questions going to competency and as a basis for a challenge for cause, and, independent of that, as a basis for a peremptory challenge. However, no objection to the collected jury was made, and that circumstance operated to waive the previous objections: *Flynn v. State*, 97 Wis. 44, 72 N. W. 373; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

There was an objection to the introduction of any evidence because the action is for a personal injury, and notice of the claim to defendant, in compliance with subdivision 5, section 4222, of the Statutes of 1898, was not pleaded. The idea of the appellant's **11** counsel is that the statute creates a condition precedent to the right of action, and that plaintiff must show compliance with such condition to make such right of action complete. The wording of the statute is as follows: "No action to recover damages for an injury to the person shall be

maintained unless, within one year after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction thereof is claimed of such person or corporation." That refers to bodily injuries. This is not such an action. It is not within the statute. Moreover, the statute is a limitation upon the remedy to enforce a right, not a condition of the right itself. It is a limitation statute (*Relyea v. Tomahawk etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412), unlike section 1339, which prescribes the condition of a right as distinguished from a limitation upon a remedy to enforce a right. It being a statute of limitations, if it were applicable to this case, and we say it was not, the failure to take advantage of it, other than by an objection to evidence on the trial, waived the limitation upon the remedy. The law in that regard is fully discussed in *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033, opinion by Mr. Justice Winslow.

It is urged that the cause of action stated in the complaint is for a breach of contract, hence that instructions to the jury, permitting an assessment of damages as in a tort action, were erroneous. The trial court rightly decided that the purpose of the action, as stated in the complaint, was to recover compensation for damages suffered through tortious conduct of the defendants. The complaint sets forth a conspiracy to commit a wrong and acts pursuant thereto, to the ¹² special injury of the plaintiff. There is no room for serious controversy on that point.

Several errors are assigned on the theory that the combination of liverymen, known as the Liverymen's Association of Milwaukee, to limit their services to persons patronizing them exclusively, and to monopolize the livery business in Milwaukee, including such service for the burial of the dead, and to carry prices to and maintain them at such a level as the combination might see fit to adopt, and acts done in pursuit of the purposes of such combination to the prejudice of, and regardless of their effect upon, plaintiff, were not unlawful. The trial court decided to the contrary.

It is not necessary in this case to decide to what length a combination of persons in restraint of trade, and interfering

with personal liberty, may go to promote the interests of its members, without violating common-law rights and rendering such persons liable to respond in damages to the persons specially injured. Judicial expressions, in recent years at least, have not been in perfect harmony on the subject. The only safe course for the public, and legitimate course for the court, is for it to adhere strictly to the rules of the common law, both as regards what constitutes an unlawful conspiracy in restraint of trade, and the consequences to the guilty parties. So long as that is the law by which rights in regard to such matters must be tested, it is not the province of the court to change, but to administer, it.

The law applicable to this case, as regards the illegality of the combination in question, was plainly stated by this court in *Milwaukee etc. Assn. v. Niezerowski*, 95 Wis. 129, 60 Am. St. Rep. 97, 70 N. W. 166. It was there decided that all combinations in restraint of trade are contrary to public policy and illegal, unless they are for the reasonable protection, by reasonable and lawful means, of persons dealing legally with some subject matter of contract. A combination that will resort to such ¹³ means as the ruthless breaking in upon the solemnities of a funeral ceremony, or that aims to entirely monopolize such an essential to the burial of the dead according to the customs of the country as is usually furnished in cities by liverymen, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, will not stand the test above indicated. Such was the liverymen's union under consideration, by the uncontroverted evidence. Such a combination is clearly unlawful as against public policy, and the means resorted to to effect its purposes in this case were likewise unlawful. It would be hard to conceive of a combination more odiously detrimental to the public interests, and more heartlessly oppressive to individuals, than one that seeks to control the customary means used in the burial of the dead, by the resort to such wanton acts as were perpetrated by the defendants in aid of the purposes of their combination.

This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists

that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischief complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood. In *Regina v. Druitt*, 10 Cox C. C. 593, it was held that any combination of persons to stifle and prevent the free use of labor or capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his ¹⁴ talents, and his industry, is as much the subject of the law's protection as is his body.

"A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful": 2 Bishop's New Criminal Law, sec. 230; Desty's Criminal Law, sec. 11b; *Morris Run etc. Co. v. Barclay etc. Co.*, 68 Pa. St. 173, 8 Am. Rep. 159.

Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages.

If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy.

The union under consideration is within the condemnation of the common-law rule that a combination of persons, natural or artificial, to restrict legitimate trade or commerce in any field, by hampering or destroying individual liberty, stifling competition, or preventing the exercise of individual freedom

to dispose of one's labor or capital according to his ¹⁵ own free will, so long as the legal rights of other persons are not infringed upon, is unlawful. The limitations upon the rule are in the nature of exceptions to it to be shown by way of defense where the combination is shown to exist. If it is not so far-reaching, as regards effects upon the public, or time or place, or the benefits of the members are not so large, as to render the combination an unreasonable interference with trade or individual freedom, that will remove from it the stamp of illegality; yet overt, unlawful acts, by two or more members of the combination acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. The plainest principles of public policy, as before indicated, condemn such a monopoly as was attempted in this case, and the conduct of the defendants to carry out the purposes of the combination was as clearly unlawful.

At the close of the evidence there was a request on the part of counsel for defendant Schubert for a special verdict, whereupon the court stated that the only material controverted question of fact as to such defendant was whether he participated in the withdrawal of the hearse, as stated in the complaint, and that counsel might frame a question covering that subject. At the close of the argument the request for a special verdict was renewed, and questions submitted for approval of the court. Such request was then denied as made too late, and the court proceeded to submit the case to the jury, by a general charge, for decision on the question of whether defendants, or either of them, participated in depriving plaintiff of the hearse after it arrived at his house on the day of the funeral, and on the question of whether the taking away of the hearse inflicted injury to the plaintiff's feelings, and whether the act was perpetrated with willful intent to insult and injure plaintiff; also for an assessment of damages under rules given by the court.

The refusal to grant the request for a special verdict upon ¹⁶ the ground assigned therefor was error. Under section 2858 of the Statutes of 1898, the right to such a verdict was absolute, the request therefor having been made, in conformity with the statute, before any argument to the jury. The record indicates that the learned trial court did not consider the request complete till questions were prepared and submitted, because, when it was first made, preparation of questions by counsel was directed, and when they were presented and the request renewed, it was denied as coming too late.

The statute, in mandatory language, clearly imposes on the trial court the duty of preparing the form for the special verdict where one is seasonably requested: *Schumaker v. Heine-mann*, 99 Wis. 251, 74 N. W. 785. It will hardly do to shift that duty onto counsel for the moving party and then deny his motion because the duty is not performed before arguments to the jury commence. The plain letter of the statute was violated. The only legitimate purpose of suggestions from counsel, as to what particular questions shall be submitted for a special verdict, is to direct the attention of the court to the issuable facts upon which the controversy depends. If the verdict does not cover all the issues essential to a determination of the case, no judgment can be rendered upon it but if it does cover such issues, no error can be successfully assigned because the form for the questions suggested by counsel was not adopted, or because questions were not framed and requested by such counsel.

The question of whether the refusal of the request for a special verdict constituted reversible error turns on whether it was prejudicial; for by the settled practice and the mandate of the statute (Stats. 1898, sec. 2829), the court must, at every stage of the action, disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party. The truth of the saying by Chief Justice Dixon, in the early history of the court, that the statute is a beneficent provision which covers a multitude ¹⁷ of errors, grows in significance as the instances multiply where the way to justice is by it rendered direct and certain and speedily traversed, notwithstanding numerous errors happening through inadvertence, negligence, or inefficiency at some point, that otherwise would delay and render the enforcement of remedies so burdensome as to, in effect, constitute a denial of justice in whole or in part.

The statute applies here. The court rightly decided, as before indicated, though the decision was not thereafter strictly followed in the charge, that the conduct of the defendants was wrongful, intentional, and specially injurious to plaintiff, entitling him to his remedy in damages therefor. It was discretionary with the court whether to direct the jury, in case of awarding exemplary damages, to separate the amount assessed therefor from the amount allowed for compensatory damages. Though the charge would indicate to the contrary, the record shows that all the facts warranting punitive dam-

ages were admitted, or were established by the evidence without reasonable controversy. Such being the case, there was nothing to submit to the jury except the mere question of the amount of the verdict. The trial court was not bound, on request for a special verdict, to submit questions covering uncontroverted facts: *Ault v. Wheeler etc. Mfg. Co.*, 54 Wis. 300, 11 N. W. 545; *Kerkhof v. Atlas etc. Co.*, 68 Wis. 674, 32 N. W. 766; *Ward v. Chicago etc. R. R. Co.*, 102 Wis. 215, 78 N. W. 442.

It follows that the denial of the motion for a special verdict was wrong solely on the ground of the reason assigned for it. It was useless to require the jury, as did the court, to say whether defendants, or either of them, participated in depriving plaintiff of the use of the hearse, because Schubert said he instructed his driver to return to the barn if a non-union man was in charge of the funeral, and that he gave such instructions in conformity to his obligations to the union; the evidence was all one way that Buening was the ¹⁸ moving spirit in causing the driver of the hearse to obey the instructions of his master, and that his acts were in accord with his duties as secretary of the union, and in conformity to a request made of him, either by Schubert himself or by some one in his behalf, whose acts Schubert fully ratified with knowledge of all the facts. Such ratification rendered Schubert liable for actual and exemplary damages the same in all respects as if he had originally authorized Buening to act in his behalf: *Robinson v. Superior etc. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, 68 N. W. 961. There was perfect concert of action between all the parties concerned in the transaction to deprive plaintiff of the use of the hearse, and the acts of each and all were in accord with the agreement between the members of the union.

The court needlessly required the jury to say whether facts existed warranting an assessment of exemplary damages. It was sufficient that they were instructed that the assessment of such damages was discretionary with them.

It was correctly said by the court, in substance, before the formal charge was given, that the acts of the defendants were willful and with intent to deprive plaintiff of the use of the hearse at a time when they knew it would be impossible to supply another. As men of common sense, defendants must have known that their conduct would greatly shock the sensibilities of the plaintiff, would humiliate and cause him great mental confusion, pain, and suffering. No reasonable conclusion could

be arrived at from the evidence, other than that the defendants intentionally carried out their unlawful design under such circumstances as to demonstrate the power of the combination to punish liverymen for doing business in an independent way, and persons for dealing with such nonunion liverymen; that with such ends in view they proceeded with reckless disregard of consequences and with full knowledge of the inevitable result to plaintiff. All the elements of fact warranting exemplary damages appear ¹⁹ clearly from the evidence as matter of law. There was the willful violation of plaintiff's rights, inflicted under circumstances of aggravation, insult, or cruelty, with vindictiveness and malice: *McWilliams v. Bragg*, 3 Wis. 424; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342.

The trial judge, in his charge to the jury, divided recoverable damages into three kinds—actual, compensatory, and exemplary. He said, "If you find for the plaintiff, the damages which he may recover are actual and compensatory damages." He then, in effect, told the jury that eight dollars was the actual damage by the undisputed evidence, and that they should find a verdict at least for that sum; and then said, "If you find that the act of taking away the hearse was one of insult and humiliation to the plaintiff, then you may also allow damages to plaintiff's feelings for the insult, humiliation, and anxiety of mind suffered by him in consequence of such act." Further instructions were given on the subject of punitive damages. Exception was taken to that portion of the charge in regard to allowing damages for injured feelings, and also to a refusal to charge the contrary doctrine.

The views of the law so given to the jury were erroneous and prejudicial in several particulars, notably in the one specifically excepted to. Damages in a tort action are not divided into actual, compensatory, and exemplary. The term "compensatory damages" covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term "compensatory damages." "Compensatory damages" and "actual damages" are synonymous terms. Pecuniary loss is an actual damage; so is bodily pain and suffering: *Wilson v. Young*, 31 Wis. 574. The jury should have been told that plaintiff was entitled to recover full compensatory damages, and then instructed as to their elements in a case like this. If it were a case where recoverable damages included ²⁰ injury to the feelings, the jury should have been made to understand that compensation there-

for was a matter of right, not a matter in their discretion. When guilt is established in a tort action, whether exemplary damages should be allowed or not is submitted to the judgment of the jury; but not so compensatory damages.

In this case there was no physical injury to plaintiff, and no personal injury to him of any kind, save to his feelings. The case does not fall within the few exceptions to the rule—which prevails in this state and in most jurisdictions—that mental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages. The true idea is that, under the general principle applicable to tort actions that recoverable damages are limited to such as are the natural and proximate result of the act complained of, some physical injury is necessary to a definite causal connection between the wrongful act and the mental condition, to render the former, in a legal sense, the cause of the latter, and such condition, with its immediate cause, sufficiently significant to be comprehended and measured in a money standard by average human wisdom with a reasonable degree of certainty.

We will not go further in the discussion of the rule of damages. The law in regard to it, for this state, was, upon full consideration, declared in *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973, opinion by Mr. Justice Winslow. The general rule there stated is clearly applicable to this case. There are exceptions which will be found pointed out in the *Summerfield* case, but they have no reference to a case of this kind.

The numerous exceptions saved by appellants might be discussed in much greater detail, but they are in the main covered by the foregoing. There were some propositions contained in the requests refused which were correct in the abstract, but unnecessary to the case because the facts were ²¹ not disputed, and immaterial because inapplicable to the facts. For the error in regard to the rule of damages the judgment must be reversed. No other reversible error has been discovered in the record.

By the Court. The judgment of the superior court is reversed, and the cause remanded for a new trial.

COMBINATIONS IN RESTRAINT OF TRADE ARE UNLAWFUL.—Combinations of individuals formed for the purpose of stifling competition in trade are against public policy and void: *Texas etc. Oil Co. v. Adone*, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274. A pool or combination to control the price of beer in a city and

county is unlawful: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 102. Compare *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888.

CONSPIRACY TO BOYCOTT—UNITED ACTION—COERCION—REDDRESS.—If a person is injured in his business by the withdrawal of patronage through the united action of an association, he is entitled to redress, where the concert of action was produced by coercive measures, such as the imposition of fines and penalties, notwithstanding the voluntary acceptance by members of laws providing for the imposition of coercive fines: *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607.

INTERFERENCE WITH ANOTHER'S BUSINESS—LIABILITY. Acts done for the purpose of breaking up the business of another, because he will not join in making a scale of prices, must be deemed malicious, and, therefore, the doers of them are personally liable to the person injured thereby: *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924.

EXEMPLARY DAMAGES IN AN ACTION FOR A TORT are within the discretion of the jury, and the court should not undertake to influence their verdict by instructions: *Robinson v. Superior etc. Ry. Co.*, 94 Wis. 345, 59 Am. St. Rep. 897, and note, 68 N. W. 961.

DAMAGES—TORT—MENTAL ANGUISH.—In an action for a tort damages may be recovered for all injuries resulting from the wrongful act: *Vosburg v. Putney*, 80 Wis. 523, 27 Am. St. Rep. 47, 50 N. W. 403; but it is against the policy of the law to permit a recovery of damages for mental suffering. The cases, however, upon this question, are in conflict: *Notes to Chappell v. Ellis*, 68 Am. St. Rep. 825; *Kalen v. Terre Haute etc. R. R. Co.*, 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534-537, discussing mental anguish as an element of damages.

HILDEBRAND v. CARROLL.

[106 Wis. 324, 82 N. W. 145.]

BAILMENT—NEGLIGENCE—ACTION FOR DAMAGES—EVIDENCE.—IT IS PREJUDICIAL ERROR, in an action to recover damages for an injury to a horse, hired by the plaintiff to the defendant, and which the plaintiff claims was foundered while in the defendant's possession, to permit the defendant, against objection, to establish his defense by hearsay testimony.

BAILMENT—ACTION FOR DAMAGES—BURDEN OF PROOF.—When a bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, and the property is returned in a damaged condition, and it is shown that the injury is such as does not ordinarily occur without negligence, proof of these facts establishes a *prima facie* case against the bailee, throwing upon him the burden of showing that the injury did not occur through his negligence.

Action to recover damages for an injury to a horse, hired by a liveryman, the plaintiff, Hildebrand, to the defendant, Car-

roll, for the purpose of driving to a place called Montello, some twenty-two miles distant. The horse, when brought back, was foundered. There was a verdict for the defendant and the plaintiff brought error.

Daniel H. Grady, for the plaintiff in error.

Fowler & McNamara and C. A. Fowler, for the defendant in error.

326 BARDEEN, J. 1. On the trial the defendant was permitted, against plaintiff's objection, to testify that Mr. Goff, who examined the horse at Montello, told him that it was an old founder, and to take the horse and drive it home. One of the main facts in controversy was whether the horse had become injured while in defendant's possession. While the evidence regarding the condition of the horse prior to the hiring is vague and unsatisfactory, there is evidence from one witness that he "was in good condition" when delivered to defendant. The man Goff had had thirty-five or forty years' experience in handling and trading horses, and had been called to examine the horse in question. To permit the defendant to relate to the jury the conclusion he had come to with relation to the very matter that was at issue was allowing him to establish his defense by hearsay. The matter was material, and bore directly upon the controversy the jury was to determine. It requires no argument or citation of authorities to demonstrate the harmful character of such evidence. Its reception was erroneous and contrary to the rules of evidence.

2. It is also urged as error that the court refused to permit the plaintiff to testify in rebuttal as to certain admissions made by the defendant to him. Under the circumstances, it was plainly a matter of discretion with the trial court. We perceive no ground for saying that such discretion was abused.

3. The plaintiff submitted the following request to instruct the jury, which was refused: "You are charged that, if you find that the horse in question was delivered to the **327** defendant in good condition and returned in a damaged state, there is cast upon the defendant the burden of showing that the loss or injury did not occur through his negligence." The court, however, gave the following instruction, which was accepted to: "You are instructed that the burden of proof is on the plaintiff to show not only injury to the horse, but also that the injury resulted from a want of ordinary care on the part

of the defendant; that is, it is incumbent to be shown by the testimony—by a preponderance of the evidence—that the horse was injured, and that it resulted from the want of ordinary care on the part of the defendant.” The request and the instruction given fairly raised the question frequently referred to in the books as to the “burden of proof” in cases of this kind. The general rule in actions for negligence is that the burden of proof is upon the party asserting it. The rule in this state is carried to the extent of holding that the burden of proving contributory negligence is upon the party asserting it: *Randall v. North Western Tel. Co.*, 54 Wis. 140, 41 Am. Rep. 17, 11 N. W. 419.

In speaking of the relative duties and obligations of bailors and bailees, some confusion has arisen in the books as to the burden of proof to establish negligence. Technically speaking, that burden always rests upon the plaintiff. But there are certain classes of bailments, when the property is in the exclusive possession of the bailee, and the property is returned damaged, in which it is said the law casts upon the bailee the burden of showing that the loss did not occur through his negligence. The authorities are by no means harmonious on this question. The ancient rule and older decisions are to the effect that the loss or injury raises no presumption of negligence. The more modern decisions hold that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense: 3 Am. & Eng. Ency. of Law, 2d ed., 750, and cases. It is not our purpose to review or attempt to reconcile these ³²⁸ decisions. This court, never having passed upon the rule properly applicable to the facts in this case, feels at liberty to adopt one that will fully meet its requirements, and still preserve harmony in the law of negligence. We therefore hold that when the bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, and the property is returned in a damaged condition, and it is shown that the injury is such as does not ordinarily occur without negligence, proof of these facts establishes a *prima facie* case against the bailee to put him on his defense. In other words, when such a showing is made, the plaintiff has made a *prima facie* case under the rule that the burden is on the party asserting negligence; and the law will then presume negligence to have been the cause, and casts upon the defendant the burden of showing the loss did not occur through his negligence, or, if he cannot affirmatively do

this, that, at least, he exercised a degree of care sufficient to rebut the presumption of it. Thus it will be seen that, upon proof of the facts mentioned, a *prima facie* case is made, and the law then shifts the burden to the defendant to rebut it. The following authorities may be noted in support of this conclusion: Lawson on Bailments, sec. 332; Story on Bailments, sec. 410, note; Jones on Evidence, sec. 184; Collins v. Bennett, 46 N. Y. 490; Arnot v. Branconier, 14 Mo. App. 431; Parry v. Squair, 79 Ill. App. 324; Cumins v. Wood, 44 Ill. 416, 92 Am. Dec. 189; Logan v. Mathews, 6 Pa. St. 417; Funkhouser v. Wagner, 62 Ill. 59; Mills v. Gilbreth, 47 Me. 320, 74 Am. Dec. 487. See Donlan v. Clark, 23 Nev. 203, 45 Pac. 1; Ford v. Simmons, 13 La. Ann. 397; Boies v. Hartford etc. R. Co., 37 Conn. 272, 9 Am. Rep. 347; Wiser v. Chesley, 53 Mo. 547; Wintringham v. Hayes, 144 N. Y. 1, 43 Am. St. Rep. 725, 38 N. E. 999. See Hill v. American Surety Co. (Wis.), 81 N. W. 1024; Hill v. Winterhalter, 107 Wis. 19, 82 N. W. 691. A contrary rule is asserted in some of the states, but the one announced is supported by a more numerous array of authorities, and is deemed the more reasonable.

Under this rule the instruction requested would not have been proper, as it omits any reference to the question of the ³²⁰ bailee's exclusive possession, and also the necessity of a showing by plaintiff that the loss was such as would not ordinarily occur without negligence of the bailee. The instruction given, however, was faulty, as carrying the rule to the other extreme. The burden was imposed upon plaintiff not only to show the injury complained of, but that such injury resulted from the defendant's want of ordinary care. Under these instructions the duty of defendant to explain as to the injury to the horse, if the jury believed that such injury would not have resulted from ordinary use, was not fairly submitted to them, and hence was prejudicial to the plaintiff.

By the Court. The judgment of the circuit court is reversed and the cause is remanded for a new trial.

BAILMENTS FOR HIRE—BURDEN AND SHIFTING OF PROOF.—In an action by a bailor against a bailee for hire to recover for the destruction of, or injury to, the property through the negligence of the latter, the burden of proof is first upon the bailor to show the bailment, the condition in which the bailee took the property, and that he returned it in a damaged condition, or did not return it at all; and if the property was in good condition for the uses of the bailment when delivered, and was returned in a damaged condition, or not at all, the burden of proof shifts to the bailee to show a cause producing the injury which, *prima facie*,

did not arise or result from, or operate on account of, a want of ordinary care on his part. This being shown, the burden of proof shifts back to the bailor to affirmatively show some negligence on the part of the bailee producing the injury complained of: *Higman v. Camody*, 112 Ala. 267, 57 Am. St. Rep. 33, 20 South. 480. See, also, *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189.

BERGERON v. PEYTON.

[106 Wis. 377, 82 N. W. 291.]

LARCENY—MONEY PAID BY MISTAKE.—A person is guilty of larceny where he, upon presenting a check to a bank for payment, receives, through the cashier's error, more money than the check calls for, and, with knowledge of the facts, refuses to return it upon demand.

FALSE IMPRISONMENT.—UNJUSTIFIABLE IMPRISONMENT, without process, is false imprisonment.

FALSE IMPRISONMENT.—IT IS NOT JUSTIFIABLE to arrest and detain a person who has received overpayment on a check from a bank, merely to compel repayment, and not for the purpose of taking him before a magistrate, and it is, therefore, false imprisonment.

FALSE IMPRISONMENT—EVIDENCE.—IT IS ERROR, in an action for false imprisonment, to permit the plaintiff to testify that he is a married man and has a family, for it is calculated to improperly increase the damages.

FALSE IMPRISONMENT—EVIDENCE.—IT IS ERROR, in an action for false imprisonment, where the plaintiff was arrested and detained for the sole purpose of compelling him to repay an overpayment received from a bank by him, to permit him to prove that, subsequently to his arrest, the defendant commenced a civil action against him and garnished the chief of police, who was supposed to have the money.

FALSE IMPRISONMENT—INSTRUCTIONS.—IT IS ERROR, in an action for false imprisonment, where the court has limited the recovery to compensatory damages, and no special damages are alleged, to instruct the jury to consider the question of injury to the plaintiff's reputation, and assess such sum as will fairly compensate him for "the injury, if any, to his reputation."

FALSE IMPRISONMENT—INSTRUCTIONS.—IT IS ERROR, in an action for false imprisonment, to instruct the jury not to return a verdict for a mere nominal amount; that if the plaintiff was falsely imprisoned, he is "entitled to substantial damages," if any; and that they are the judges of how much that should be.

Ross, Dwyer & Hanitch and George B. Hudnall, for the appellant.

Crownhart & Foley and W. R. Foley, for the respondent.

378 CASSODAY, C. J. This action was commenced May 23, 1898, against the defendant Peyton and one F. E. Grant to

recover damages for false imprisonment, May 19, 1898. The defendant Peyton answered by way of admissions, denials, and counter-allegations. At the close of the trial of the issues thus formed, the jury returned a special verdict to the effect: 1. That the plaintiff was imprisoned by both defendants, acting jointly, May 19, 1898; 2. That such imprisonment was by both defendants; 3. That such imprisonment began after the defendant Peyton's first demand for his money had been refused by the plaintiff at the bank; 5. That before the plaintiff was so imprisoned he had not formed the purpose of appropriating the overpayment to his own use; 6. That at the time the money was paid to the plaintiff at the bank he did not know he was getting the sixty-odd dollars; 7. That the defendants jointly engaged in the imprisonment of the plaintiff at the commencement of such imprisonment; 8. That, assuming that the plaintiff's imprisonment began shortly after he returned to the bank with the defendant Grant, they assessed his damages at one hundred dollars; 10. That the purpose of the defendants in imprisoning the plaintiff was solely to compel or induce him to repay the forty-three dollars overpaid. From the judgment entered upon such verdict for one hundred dollars damages and sixty-four dollars costs the defendant Peyton brings this appeal.

The circumstances under which the alleged arrest was made are to the effect that on the day named the plaintiff, having received from one Magloire Beaudoin a time check, payable about a month afterward, for work performed by him, which check stated that the plaintiff's work came to sixty-seven dollars and thirty cents, "less Camp acct. five dollars and twenty cents," and "less cash, forty dollars," leaving the "balance due twenty-two dollars and ten cents," presented the same to the appellant Peyton at his bank, known as the Superior Bank, in West Superior, to be discounted at five per cent, as had been customary; that Peyton, by some inadvertence failing to observe the payments made on the account and deducted ³⁷⁹ in the check and that the check only called for twenty-two dollars and ten cents, cashed the same on the supposition that it called for sixty-seven dollars and thirty cents, thus paying to the plaintiff about sixty-four dollars instead of about twenty-one dollars; that the plaintiff did not then know, as the jury found, that he had received about forty-three dollars more than he was entitled to, but did discover the fact at a saloon named, four or five blocks from the bank, about half an hour after he

left the bank; that, soon after, the plaintiff met the defendant Grant, who was looking for him, and who took him to the bank; that Peyton then demanded the repayment of the forty-three dollars, which the plaintiff, who had been drinking, repeatedly refused to repay, and stated that he would keep the money; that the plaintiff was then taken by the defendant Grant, who was a police officer, to the magistrate, and subsequently he was taken to jail.

Error is assigned because the court refused to grant a non-suit or direct a verdict in favor of the defendants. There is no claim that the defendant Grant received any process against the plaintiff, or that any process was issued against him, prior to the time when he and Grant went to the office of the municipal judge, after they had been together at the bank. The plaintiff testified to facts from which the jury were at liberty to find, as they did, that he was imprisoned at the bank. If he was so imprisoned, then such imprisonment was without process. If he was imprisoned without process, and such imprisonment was unjustifiable, then it was false imprisonment: *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603; *Gelzenleuchter v. Neimeyer*, 64 Wis. 321, 54 Am. Rep. 616, 25 N. W. 442; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011. The question recurs whether such imprisonment without process was justifiable. Manifestly, it devolved upon the defendants, if they could, to prove facts justifying such imprisonment: *Allen v. Wright*, 8 Car. & P. 522; *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253. It is a very singular fact—if it be a fact—that the plaintiff did not know at the time that he received from the ³⁸⁰ bank forty-three dollars more than he was entitled to. But he testified that he did not, and the jury evidently believed him. He admits, however, that he knew it before he was at the bank the second time; and that, with knowledge of that fact, he refused to pay back the money when demanded. Such refusal to pay back the money was a conversion of the money. It is true that the plaintiff received the money with the consent of Peyton. But the consent was only given by reason of a mistake on his part, which the plaintiff had discovered and admitted before he refused to pay back the money. Was such conversion of the money a crime? This court held many years ago that a conversion by a servant to his own use of property of the master put in his charge was larceny, and that the felonious intention to so convert need not have existed in the servant's mind at the time of receiving the property into his charge: *State v.*

Schingen, 20 Wis. 74. Our statute declares, in effect, that a bailee of money or property who shall "fraudulently convert the same to his own use . . . shall be guilty of larceny": Stats. 1898, sec. 4415. The same section provides that, if the property so converted shall exceed the value of twenty dollars, such bailee may be punished by imprisonment in the state prison; and another section of the statutes makes such an offense a felony: Stats. 1898, sec. 4637. It has been held in New York that "one who receives from another money to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to cheat and defraud the owner thereof, is guilty of larceny": *Wolfstein v. People*, 6 Hun, 121. To the same effect, *People v. Call*, 1 Denio, 120, 43 Am. Dec. 655; *Hildebrand v. People*, 56 N. Y. 394, 15 Am. Rep. 437; *Phelps v. People*, 72 N. Y. 334, 362; *Welsh v. People*, 17 Ill. 339; *Murphy v. People*, 104 Ill. 528; *People v. Martin*, 116 Mich. 446, 74 N. W. 653.

The more important question is whether the circumstances were such as to justify the imprisonment without process. ³⁸¹ As held in *Allen v. Wright*, 8 Car. & P. 522, it was not only incumbent on the defendants to show that the crime had been committed, "but that the circumstances of the case were such that they, or any reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it." To the same effect, *Cahill v. Fitzgibbon*, L. R. 16 Ir. 371. It has been held in New Jersey that "a private person is justified in making an arrest where a felony has actually been committed and there is probable ground to suspect the arrested person of guilt": *Reuck v. McGregor*, 32 N. J. L. 70. When a felony has been committed, an officer or a private individual may justify the arrest of a suspected person without a warrant, for the purpose of bringing him before an examining magistrate, if done upon proof of probable cause: *Brockway v. Crawford*, 3 Jones, 433, 67 Am. Dec. 250. To that extent that case may be sanctioned. Under these authorities, and the facts stated, it would seem that the defendants would have been justified in arresting the plaintiff, without warrant, for the purpose of bringing him before the municipal court to be dealt with according to law. The difficulty in holding that the trial court should have directed a verdict for the defendants is that there is evidence tending to prove, and the jury found, that the defendants did not arrest

the plaintiff for the purpose of taking him before the magistrate, but for the sole purpose of compelling and inducing him to repay to the defendant Peyton the forty-three dollars thus overpaid to the plaintiff. The imprisonment of the plaintiff for such a purpose was false imprisonment. In such a case "probable cause is only material in mitigation of damages": 3 Sutherland on Damages, 2d ed., sec. 1257. The proof of malice is only permissible where punitive damages are allowable. It follows from what has been said that the trial court properly refused to direct a verdict in favor of the defendants. In other words, there is evidence ³⁹² tending to prove that the defendants were technically guilty of false imprisonment.

Error is assigned because the court permitted the plaintiff to testify that he was a married man and had a family. Such evidence was well calculated to improperly increase the damages, and was in direct conflict with the decisions of this court: Kreuziger v. Chicago etc. R. R. Co., 73 Wis. 158, 40 N. W. 657; Gores v. Graff, 77 Wis. 181, 46 N. W. 48.

So we think it was error to permit the plaintiff to prove that, subsequent to the plaintiff's arrest, Peyton commenced a civil action against him and garnished the chief of police, who was supposed to have the money. It was certainly not the best evidence. Moreover, it tended to establish an improper measure of damages. It is true the court charged the jury not to allow any damages by way of punishment; but the objectionable testimony was not withdrawn from the jury: Bradley v. Cramer, 66 Wis. 304, 28 N. W. 372; Beggs v. Chicago etc. R. R. Co., 75 Wis. 444, 44 N. W. 633; Waterman v. Chicago etc. R. R. Co., 82 Wis. 631, 632, 52 N. W. 247, 1136.

So we think it was error for the court to charge the jury that they should take into consideration the question of injury to the plaintiff's reputation, and assess such sum as would fairly compensate him for "the injury, if any, to his reputation." This is especially true where, as here, the trial court has limited the recovery to compensatory damages, and no special damages are alleged as to any such injury: 3 Sutherland on Damages, 2d ed., secs. 1257, 1258.

So we think it was error for the court to charge the jury to the effect that they must not return a verdict for a mere "nominal amount—that is, six cents, or one cent, or one dollar—by which verdict," they "would say there had been technically a wrong done"; that if the plaintiff had been falsely imprisoned he was "entitled to substantial damages," if any; and

that they were "the judges of how much that substantial damages should be": *Candrian v. Miller*, 98 ³⁸³ Wis. 167, 168, 73 N. W. 1004; *Guinard v. Knapp-Stout etc. Co.*, 95 Wis. 483, 70 N. W. 671. Thus, in an action for false imprisonment, in New York, it was held error to set aside a verdict for six cents damages: *Henderson v. McReynolds*, 38 N. Y. St. Rep. 734, 14 N. Y. Supp. 351. So, in England, it has been held that the court properly refused a new trial where, in an action for false imprisonment, "the jury had given only one farthing damages for taking the plaintiff before a magistrate upon an unfounded charge of felony, merely because a question of character was involved": *Apps v. Day*, 26 Eng. L. & Eq. 335.

Error is assigned because the court directed the jury to the effect that, if they agreed before the next morning at 9 o'clock, they should seal their verdict and hand it to the officer in charge, but not to report to the court until the day after at 9 o'clock, thus skipping a day when court was in session. The jury agreed on the evening of January 24, 1899, but, in pursuance of such instruction, did not report until the morning of January 26th. The practice of thus allowing the jury to seal their verdict and part with the same, and then separate for one or two days, is certainly not to be commended. But the trial court has a broad discretion in such matters, and we do not feel called upon to determine whether it did or did not abuse such discretion in the case at bar.

By the Court. The judgment of the superior court of Douglas county is reversed and the cause is remanded for a new trial.

LARCENY—KEEPING OVERPAYMENTS.—If one person paying money to another overpays him by mistake, and the latter, after demand, keeps the money and refuses to make restitution, it is larceny: See monographic note to *State v. Homes*, 57 Am. Dec. 280, on larceny; *State v. Ducker*, 8 Or. 394, 34 Am. Rep. 590, and note. The appropriation of a part or the whole of money handed to one to make change is also larceny: Note to *Jones v. State*, 54 Am. St. Rep. 435.

FALSE IMPRISONMENT is the unlawful restraint of a person contrary to his will, either with or without process of law: See monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 408, on false imprisonment.

FALSE IMPRISONMENT—DAMAGES.—In an action for false imprisonment, the court can never confine the jury to either nominal or special damages, if there has been real personal injury; and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum: *Page v. Mitchell*, 13 Mich. 63, 86 Am. Dec. 75.

FIELDS v. MUNDY.

[106 Wis. 383, 82 N. W. 343.]

STATUTES—COLLECTION OF CLAIMS AGAINST ESTATES OF DECEDENTS—EXCLUSIVE REMEDY.—A statute giving a remedy for the collection of claims against the estates of deceased persons, and fixing a time limit for their presentation to the court, furnishes the exclusive remedy for the collection of such claims.

LIMITATIONS OF ACTIONS—CLAIMS AGAINST ESTATES OF DECEDENTS—NONRESIDENTS—FOREIGN JUDGMENT.—A claim against the estate of a deceased person, not presented to the court within the time limited by the statute of the state for that purpose, is forever barred; and the bar of the statute covers all claims, whether belonging to residents or nonresidents, and whether put in judgment in a foreign court or in a court of this state, before being filed in the probate proceedings. The full faith and credit clause of the federal constitution does not apply to such a case.

Mundy's will was admitted to probate in the county court of Douglas county, Wisconsin, and in the probate court of St. Louis county, Minnesota. The assets within the jurisdiction of the Minnesota court becoming exhausted, the appellant, Fields, a resident of Minnesota, and who had obtained an allowance of his claim against the estate, by the Minnesota court, filed his claim in the Wisconsin court, but after the time limited by the statute of the latter state for the presentation of claims. He based his claim on the allowance thereof in the Minnesota court. It was rejected as barred by the statute of limitations. The circuit court affirmed the order of the county court, and the claimant appealed.

Reed & Reed, for the appellant.

Thomas A. E. Weadock, for the respondent.

385 MARSHALL, J. The vital question on this appeal is not whether the allowance of the appellant's claim in the Minnesota court was *res adjudicata* of its validity in the county court of Douglas county, under the full faith and credit clause of the federal constitution, as to the effect of the judicial proceedings of one state in the courts of another. Considerable learning on that subject is displayed in the brief of counsel for appellant, but we fail to see how it applies to this case. The sole question demanding consideration here is, Did the allowance of the claim in the Minnesota court give to it any different status, as regards the statute of limitations (Stats. 1898, sec.

3844) upon the life of claims against estates of deceased persons in this state, than that of any other claim?

Such section provides that: "Every person having a claim against a deceased person, proper to be allowed by the court, who shall not, after notice given as required by section 3840, exhibit his claim to the court within the time limited for that purpose, shall be forever barred from recovering such demand or from setting off the same in any action whatever." Section 3840 gives a remedy for the collection of claims against the estates of deceased persons and provides for a ³⁸⁶ time limit to be fixed for the filing of such claims in the county court, and for giving notice of such time to all parties interested. The remedy thus provided is the sole remedy for the collection of claims against an estate in the courts of this state where notice has been given of the time limit for the filing of claims as therein provided: *Price v. Dietrich*, 12 Wis. 626; *Lannon v. Hackett*, 49 Wis. 261, 5 N. W. 474. It applies to nonresidents as well as residents: *Carpenter v. Murphey*, 57 Wis. 541, 15 N. W. 798; *Austin v. Saveland's Estate*, 77 Wis. 108, 45 N. W. 955; *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883. And that and section 3844 extinguishing claims, so far as enforcement thereof is concerned in the courts of this state, not filed as provided by section 3840, admit of no exception in favor of nonresidents: *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883.

The statute itself is so plain, and the decisions of this court as well, that no room is left, as it seems, for the court to say otherwise than that the appellant's claim was barred by the laws of this state before it was filed with the county court of Douglas county. The bar of the statute covers all claims, whether belonging to residents or nonresidents, whether put in judgment in a foreign court or in a court of this state before being filed in the probate proceedings.

This is not a case where the court has power to relieve the appellant from the effect of his negligence, ignorance, or mistake, in failing to file his claim in the county court of Douglas county within the time allowed by law. The statutes left him no remedy, after the lapse of the time fixed by the county court for the filing of his claim. Therefore, his right, so far as this state is concerned, died with the lapse of the remedy to enforce it, and the persons interested in the estate of Mundy became thereby possessed of a vested right to insist upon the bar of the statute, which is within the protection of the constitution as a property right and that cannot be taken away from them by the

court: *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433. The bar of the statute absolutely³⁸⁷ extinguished the claim. It could not be waived by any failure to plead the statute in the county court (County Court Rule 13, sec. 6), or by any act on the part of the executor.

From what has been said it is plain that the circuit court had no other course to pursue than to affirm the judgment of the county court, upon the ground that appellant no longer had a claim against the estate of Mundy that could be recognized in the courts of this state.

By the Court. Judgment affirmed.

LIMITATIONS OF ACTIONS.—A CLAIM AGAINST A DECEDENT'S ESTATE must, under the Illinois statute, be exhibited in two years from the grant of administration, to be enforceable against the estate already inventoried and accounted for, and a plea that it was not so exhibited in an action thereon is good. But the bar is not absolute. The claim remains payable out of estate subsequently discovered or inventoried: *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455, and note.

PINNEY v. PROVIDENCE LOAN AND INVESTMENT COMPANY.

[106 Wis. 396, 82 N. W. 308.]

STATUTES AS TO CONSTRUCTIVE SERVICE UPON CORPORATIONS SHOULD PROVIDE FOR NOTICE.—While the legislature may authorize constructive service of summons to be made upon corporations, especially where the action concerns property located within the state, the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, thus securing an opportunity to be heard and to make a defense.

STATUTES AS TO CONSTRUCTIVE SERVICE UPON CORPORATIONS—WHEN VOID.—A statute providing that, until a domestic private corporation files with the register of deeds of the county in which its principal office is located a list of its officers upon whom service of process, etc., may be made, such service may be made by leaving a copy of the process, etc., with the register of deeds, is void, as contravening the constitutional provision that no person shall be deprived of his property without due process of law. The corporation is a "person" within the meaning of such provision, and such service does not give it notice and an opportunity to be heard.

Catlin, Butler & Lyons and Thomas E. Lyons, for the appellant.

Thorson & De La Motte and J. De La Motte, for the respondent.

³⁹⁷ CASSODAY, C. J. The plaintiff, as the grantee in a tax deed issued to her August 16, 1898, by Douglas county, upon the tax sale of 1895 for the taxes of 1894, claims to have commenced this action October 4, 1898, under section 1197 of the Statutes of 1898, against the defendant Providence Loan and Investment Company, as the former owner of the land described, and one Sarazin, claiming to be a part owner thereof, to bar them and each of them from all right, title, interest, and claim in and to the lands described. It appears that service of summons was made or claimed to have been made on the defendant Sarazin as a resident of Houghton, Michigan, by publication. There was no appearance in the action, and judgment on default was entered February 25, 1899, according to the prayer of the plaintiff's complaint. The only proof of service of the summons or the summons and complaint on the defendant corporation found in the judgment-roll, and upon which such judgment was so entered, is an affidavit of one Fred A. Russell, who became the register of deeds in January, 1899, to the effect that October 4, 1898, there was filed in his office as such register the summons and complaint in this action by delivering to and leaving with such register true copies thereof; that at that time the defendant corporation had filed no list containing the names of its president, ³⁹⁸ vice-president, secretary, treasurer, or managing agent on whom service of process, notice, or orders might have been made, as provided in subdivision 10, section 2637, of the Statutes of 1898; that such Providence Loan and Investment Company was then a private corporation, organized and existing under the laws of the state of Wisconsin; and that its principal offices were in the city of Superior, Douglas county. On September 22, 1899, the defendant corporation appeared in the action by attorneys specially, and appealed to this court from the judgment in favor of the plaintiff and against such corporation barring it from all right, title, and interest in the land described in such complaint and judgment.

On February 14, 1900, the plaintiff obtained an order upon the appellant to show cause why the plaintiff should not be allowed to amend her proof of service by filing with and making a part of the record certain affidavits thereunto attached. Upon the hearing of that motion it appeared from such affi-

davits that October 4, 1898, the plaintiff's attorney and the then register of deeds, P. A. Sandberg, searched the register's office, and found no list of officers of the defendant corporation; that the plaintiff's attorney then gave the summons and complaint to such register, who handed the same to his deputy, W. H. Smith, who filed the same and made the entry, under date of October 4, 1898: "Numerical Index Book, No. 110,482. Service on Providence Loan & Trust Co., filed." It further appeared upon such motion from an affidavit of Fred A. Russell, explaining his former affidavit, mentioned, to the effect that the only knowledge he had at the time of making that affidavit was such entry in the index book, above quoted; that he never saw the papers until February 21, 1900, and then found them among the files of notices of lis pendens. It also appears from the affidavit of one of the attorneys for the defendant corporation, in effect, that the summons and complaint were delivered to one A. C. Titus, October 4, 1898, but that, as A. C. Titus ³⁹⁹ was not an officer or agent of the defendant corporation, he paid no further attention to such service; that a few days thereafter he inquired of the register of deeds, Sandberg, who, after search in his office, said there were no papers in any such action on file therein; that September 1, 1899, he first learned that such judgment had been entered on default February 25, 1899.

The facts in regard to the summons and complaint having been delivered to and left with the register of deeds by the plaintiff's attorney October 4, 1898, are undisputed, and show a compliance with section 1775b of the Statutes of 1898, as it then stood. As indicated, the defendant company was then a private corporation organized and existing under the laws of this state, and had its principal office in the city of Superior. By the statute cited it was required, on or before October 1, 1898, to file in the office of the register of deeds of that county a list of the names of its officers therein mentioned "on whom service of process, notices, or orders" might be made as provided by subdivision 10, section 2637. The right of the legislature to require such corporation to so file such list is not and cannot be successfully questioned. It has been said upon high authority that: "A state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members.

Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law": *Pennoyer v. Neff*, 95 U. S. 735, 736. Section 1775b was also made applicable to such corporations formed after October 1, 1898. That section also provided that "in all cases until such list of officers is so filed as aforesaid service of all legal process, notices, orders or other legal proceedings may be lawfully and effectually made upon any such corporation by delivering to and ⁴⁰⁰ leaving with the register of deeds where such corporation has its principal office true copies of such legal process, orders, notices or proceedings, in which case service so made shall be valid." The subsequent amendment of that section does not affect the question here presented: Laws 1899, c. 46.

It does not appear that any attempt was made to serve the summons or summons and complaint on any of the officers of the defendant corporation, as required by subdivision 10, section 2637, of the Statutes of 1898; nor by the publication of the summons, as required by section 2639. As indicated, the only service or attempted service of the summons or summons and complaint in this action upon the defendant corporation was "by delivering to and leaving with the register of deeds" true copies of such summons and complaint, as required by the statute quoted. The important question which here confronts us is whether such service was valid and binding upon the defendant corporation; in other words, Was such service sufficient to authorize the judgment forever barring the corporation from any and all right, title, and interest in and to the land described? For the purpose of this appeal it must be assumed that at the time of the alleged service the defendant corporation had the lawful and rightful title and possession to the land. Was it deprived of such right, title, and interest in and to the land by due process of law? In other words, Is the clause of the statute quoted, authorizing such service upon the register of deeds, a valid law?

The constitution of the United States declares that "no state shall . . . deprive any person of life, liberty, or property, without due process of law": U. S. Const., amend., sec. 1, art. 14. The words "without due process of law" were borrowed from a very early English statute, as an improved rendition of the words contained in Magna Charta: 1 Coke's Second Institutes, 50; *Murray v. Hoboken etc. Co.*, 18 How. 276; *Davidson v. New Orleans*, 96 U. S. ⁴⁰¹ 101. In the first of these cases

it was said by Mr. Justice Curtis, speaking for the court, that: "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." And again he said in that case: "For, though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet this is not universally true": *Murray v. Hoboken etc. Co.*, 18 How. 280. In the last case above cited Mr. Justice Miller, speaking for the court, said: "A statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision": *Davidson v. New Orleans*, 96 U. S. 102. That court has frequently declared, in effect, that the words "without due process of law" were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice: *Bank of Columbia v. Okely*, 4 Wheat. 244; *In re Kemmler*, 136 U. S. 448, 10 Sup. Ct. Rep. 930; *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. Rep. 577; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. Rep. 570; *Marchant v. Pennsylvania Ry. Co.*, 153 U. S. 380, 14 Sup. Ct. Rep. 894. In the language of Mr. Justice Field: "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained. And wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. ⁴⁰² The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights": *Hagar v. Reclamation Dist.*, 111 U. S. 708, 4 Sup. Ct. Rep. 663. So it has been held by that court that, where a state statute authorized a commission to finally and conclusively fix the rates of charges by railway com-

panies for the transportation of property, without an opportunity for judicial inquiry as to the reasonableness of such rates, such companies were deprived of their property without due process of law: *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702. That court has just held that, although personal service on nonresidents, outside of the jurisdiction of the court, may, under proper circumstances, be sufficient to constitute due process of law in a suit for the foreclosure of a lien upon the land within the state, yet that only five days' notice in such a case, under the circumstances stated, was "insufficient to constitute reasonable notice of due process of law": *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. Rep. 410.

The important thing in all ordinary actions, and especially in a case like this, is that, before a person shall be deprived of his property by legal proceedings, he shall have actual or constructive notice and an opportunity to be heard. It is settled by numerous adjudications of the supreme court of the United States that a corporation is a "person" within the meaning of the constitutional clause in question: *Smyth v. Ames*, 169 U. S. 466, 522, 18 Sup. Ct. Rep. 418, and cases there cited. It follows that the defendant corporation cannot be deprived of its property without due process of law, any more than any citizen of the state. While foreign corporations may be permitted to do business within the state upon certain conditions, or be excluded altogether, and while domestic corporations may be subject to reasonable regulations and control, yet neither can be deprived of its property without ⁴⁰³ due process of law. Undoubtedly, the legislature may, as it has in certain cases, authorize constructive service of summons to be made upon corporations, as well as individuals, especially where the action concerns property located within the state; but the method adopted should be reasonably calculated to bring notice home to some of the officers or agents of the corporation, and thus secure an opportunity for being heard and making a defense before the determination. Such service was not secured "by delivering to and leaving with the register of deeds . . . true copies" of the summons and complaint, as prescribed by the portion of the statute quoted. On the contrary, such service, if held to be effectual, would be well calculated to conceal from the officers and agents of the corporation the fact that such an action had been commenced. True, the register is a public officer, with duties prescribed by statute; but he is in no sense the agent or representative of "private corporations, incor-

porated or organized under any law of this state." Such corporations are supposed to be clothed with authority to select and appoint their own officers and agents. We must hold the clause of the statute in question to be unconstitutional and void.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

"DUE PROCESS OF LAW" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, prior to judgment is absolutely essential: *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794.

BERGMAN v. HENDRICKSON.

[106 Wis. 434, 82 N. W. 304.]

MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—MASTER'S LIABILITY.—The tortious act of a servant, within the scope of his duty, is the act of the master himself.

MASTER AND SERVANT—SCOPE OF SERVANT'S DUTY—QUESTION FOR JURY.—If a bartender has trouble with an intoxicated customer, who refuses to pay for his drinks, and assaults him, the question as to whether the barkeeper was acting within the scope of his duty should be left to the jury, where the testimony is open to two inferences, one that the assault was entirely personal, on account of the customer's threatening motions toward the barkeeper and a vile epithet applied to the latter, and the other that the assault was committed for the purpose of enforcing payment for the liquor.

MASTER AND SERVANT—ASSAULT BY BARTENDER—SCOPE OF EMPLOYMENT—MASTER'S LIABILITY.—If an intoxicated customer at the bar of a saloon refuses to pay for his drinks, and the bartender assaults him for the purpose of collecting pay for the liquor, he acts within the scope of his employment, and his master is answerable, although the servant may have been expressly prohibited from performing his duty in such a manner, and the assault was provoked by the customer's misbehavior and insulting language.

TRIAL—IMPANELING JURY.—It is not a prejudicial error to remove a juror on a peremptory challenge after a refusal to discharge him on a challenge for cause, where no objection is made to the jury as finally impaneled.

INSTRUCTIONS—REVIEW ON APPEAL.—AN OMISSION to instruct the jury as to the burden of proof cannot be noticed on appeal, when no request was made at the trial to supply such omission.

Action by Bergman against Hendrickson and another. The defendants had a saloon in which they employed one Back-

strom as bartender. The plaintiff, while intoxicated, purchased liquor for himself and others, at the bar, and refused to pay for it. An altercation took place, whereupon the bartender assaulted the plaintiff, who fell and seriously injured his thumb. There was a judgment for the plaintiff, and the defendants appealed.

Crownhart & Foley, J. A. Murphy, and W. R. Foley, for the appellants.

George C. Cooper, for the respondent.

435 DODGE, J. 1. The principal assignment of error upon which appellants dwell is that the evidence conclusively establishes that the assault by Backstrom upon the plaintiff was entirely personal to the former for the purpose of wreaking personal vengeance, or satisfying his personal anger and indignation, aroused by a threatening motion and an opprobrious epithet applied to him by the plaintiff. Backstrom testified upon the trial that the plaintiff, in the course of the colloquy, threw his hands up across the bar, in a manner indicated ⁴³⁶ by gestures, and called him by a vile epithet, and that he thereupon lost all thought or consideration of his masters' business, or of collection for the liquor sold, and committed the assault upon the plaintiff because of such motion and epithet. On a previous trial the same witness had testified, substantially, that the assault was made because the plaintiff did not pay for the drinks, and to compel him to do so, and gave a narrative of the events which wholly omitted both the threatening motion and the verbal abuse, asserting that his narrative was complete. The defendant, who was present, gave an account of the transaction, which indicated at least that the assault was the immediate sequence of the refusal to pay, without mentioning the circumstances which Backstrom related as arousing his personal ire. The plaintiff's own story, also, while quite indefinite, tended to the same effect. We are persuaded that the conclusion of the trial court that the testimony was open to two inferences—one that the assault was entirely personal, the other that it was done with the purpose and in the line of enforcing payment—ought not to be disturbed. The appearance of the witness Backstrom, the manner of his giving the new testimony on which the appellants now dwell and of responding to the cross-examination with reference to his previous testimony, might well have justified the jury in disbelieving the new facts testified to on the last

trial, and we cannot feel justified in saying that the trial court erred in submitting to them the question of Backstrom's motive and purpose, nor in refusing to set aside their conclusion. If Backstrom committed the assault for the purpose of collecting payment for his masters' liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated—nay, although it may have been expressly prohibited—yet the master is liable for the damages caused ⁴³⁷ thereby, provided he has intrusted to the servant the duty he was attempting to perform: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Rogahn v. Moore etc. Co.*, 79 Wis. 573, 48 N. W. 669; *Reinke v. Bentley*, 90 Wis. 457, 63 N. W. 1055; *Bryan v. Adler*, 97 Wis. 12, 65 Am. St. Rep. 99, 72 N. W. 368.

2. The appellants contend further that, although the bartender may have been acting within the scope of his duties, the master is not liable if the plaintiff, by words or acts, conducted himself in such improper manner as was calculated to arouse and bring on personal altercation with the bartender, and the assault complained of was wholly or in part the result of such misbehavior on the part of the plaintiff. The court refused a requested instruction to that effect, and, on the contrary, charged: "If Backstrom was impelled to the assault, whatever words may have passed, by a purpose to enforce payment of the liquor bill that he was trying to collect, and committed the assault as incidental to such effort, plaintiff should recover." The rule thus laid down by the court is that sanctioned by the authorities above cited; and the exception thereto, contended for by appellants, in case of misconduct or verbal provocation on the part of plaintiff, is nowhere recognized. Such an exception would ignore the principle on which the liability is founded, namely, that the tortious act of the servant, when within the scope of his duty, is the act of the master himself. That being the principle, the tort, when so committed by the servant, can be justified on no grounds less cogent than those which would serve as justification of the same act if committed by the master. In *Rogahn v. Moore etc. Co.*, 79 Wis. 575, 48 N. W. 669, it is said: "It is generally agreed that for negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible." It need hardly be stated that neither

insult nor vituperation can fully justify assault and battery, though they may properly mitigate damages ⁴³⁸ in civil actions or punishment in criminal prosecutions. Appellants press upon our attention, as supporting the exemption of the master in case of misconduct or insult by plaintiff to the servant, the case of *Scott v. Central Park etc. Ry. Co.*, 53 Hun, 414, 6 N. Y. Supp. 382, which, upon examination, proves to have no relevancy whatever. That case deals with a very different ground of liability, namely, that which is imposed on the master for willful torts of a servant, although outside of the line of his duty, when the relations between the master and the plaintiff are such that the former is under an obligation to protect the latter against such wrongs, whether committed by servants or others. That liability is well stated and illustrated in *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504, and *Fick v. Chicago etc. Ry. Co.*, 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527, and is grounded not so much on the principle of respondeat superior as upon the failure of a carrier to perform its duty to protect its passengers and patrons. Such was the case urged on us by the appellants. There the driver of a street-car assaulted a passenger to avenge insults and threats offered to him personally. His act was wholly personal and outside the scope of his employment. The plaintiff's right of recovery depended, not on the fact that the assault was committed by a servant, but on the fact that he suffered any assault while entitled to protection as a passenger. The rule of law declared in that case was responsive to the situation, and went no further than to hold that a passenger is entitled to protection only so long as his own conduct merits it, and that the carrier is not bound to protect him against the usual and probable results of his own misbehavior. If the soundness of that doctrine were fully conceded, it would not affect defendants' liability in the present case, predicated not on failure to protect, but upon defendants' own affirmative wrong, committed through their servant, acting in the line of his duty.

3. An error assigned to a refusal to discharge a juror on ⁴³⁹ challenge for cause cannot serve for reversal, since no prejudice resulted to appellants. The juror was removed on peremptory challenge, and no objection was made to the jury as finally impaneled: *Emery v. State*, 101 Wis. 627, 78 N. W. 145; *Cornell v. State*, 104 Wis. 527, 80 N. W. 745. The evidence, exclusion of which is assigned as error, was all within the discretion of the trial court. Either the questions were leading or mere repeti-

tions. Omission to instruct as to burden of proof cannot be noticed on appeal when no request to supply such omission was made at the trial.

We discover no error.

By the Court. Judgment affirmed.

TORTIOUS ACTS OF SERVANT—MASTER'S LIABILITY—SCOPE OF SERVANT'S DUTY—QUESTION FOR JURY.—A master is liable to third persons for the consequences of tortious acts done by his servant in the "course of his employment," although done in disobedience of the master's orders: Note to Ware v. Barataria etc. Canal Co., 35 Am. Dec. 189; note to Noblesville etc. Road Co. v. Gause, 40 Am. Rep. 226; Burnett v. Oechsner, 92 Tex. 588, 71 Am. St. Rep. 880, 50 S. W. 562. A master is not answerable for an assault committed by his servant, while not acting within the scope of his employment, and without the master's knowledge, authority, or consent; but whether a particular act of a servant was or was not done in the line of his duty is, in most cases, a question of fact, to be determined by the jury from the surrounding facts and circumstances: See monographic note to Goodloe v. Memphis etc. R. R. Co., 54 Am. St. Rep. 85, 87, on acts of servant for which master is not answerable.

NELSON v. NUGENT.

[106 Wis. 477, 82 N. W. 287.]

ANIMALS—SHEEP-KILLING DOGS—LIABILITY FOR.—If dogs of different owners unite in killing or worrying sheep, each owner is answerable for the whole amount of damage done, where the statute makes the owner or keeper of a dog doing injury to sheep liable "for all damages so done."

ANIMALS—KILLING OF SHEEP BY DOGS—EVIDENCE.—If thirteen of the plaintiff's sheep have been killed, and others injured, by two dogs, and the tracks of one are traced to the defendant's house, the incriminating appearance of the dog, with the accompanying circumstances, is sufficient evidence to justify a verdict that the defendant's dog was concerned or engaged in the killing.

Action to recover damages for injury to the plaintiff's sheep caused by the defendant's dog, and another, whose owner was unknown. The identity and ownership of the dogs, and the amount of the damages done, were the issues involved. There was a verdict for the plaintiff, and, under instructions from the court, the jury assessed the whole of the damages against the defendant, although he owned but one of the dogs. The defendant appealed.

C. H. Van Alstine, for the appellant.

Ryan & Merton and T. E. Ryan, for the respondent.

478 BARDEEN, J. It is unnecessary to discuss the testimony. It establishes beyond question that thirteen of plaintiff's sheep were killed, and others injured. The tracks of one of the dogs were traced to defendant's house. The appearance of the dog was incriminating, and, with the accompanying circumstances, there was evidence sufficient to justify the conclusion arrived at by the jury. We do not feel called upon to disturb it upon either ground suggested by counsel.

This action is based upon section 1620 of the Statutes of 1898, which is as follows: "The owner or keeper of any dog which shall have injured or caused the injury of any person or property **479** or killed, wounded, or worried any horses, cattle, sheep, or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog or knowledge by him that his dog was mischievous or disposed to kill, wound, or worry horses, cattle, sheep, or lambs." The court charged the jury that "each owner of a dog which is concerned in or engaged in the killing, wounding, and worrying of sheep is liable for the whole amount of damages which his dog was concerned or engaged in doing." This is said to be erroneous, and the rule is asserted to be that when dogs of different owners unite in killing sheep, the wrong is not a joint wrong, but each owner must be sued separately for the damage done by his own dog: Cooley on Torts, 348.

As we read it, the statute has changed the common-law liability of the owners of dogs for injuries done by them. The object of the statute seems to have been to "encourage the raising of sheep, and to discourage the raising of dogs." The danger of damage to sheep from dogs, and the difficulty of protecting flocks, is so great that it was deemed necessary to adopt stringent measures for that purpose. It is a well-known fact that dogs which have the propensity of killing sheep often travel in pairs and make their attacks together. It is practically impossible, in most cases, to tell what damage was done by one dog and what by the other. The difficulty of apportioning the damage led the legislature to adopt the language set forth in the statute, making the owner or keeper of a dog doing injury to sheep liable for all the damage so done. The circumstance that another dog was engaged in the same act does not lessen the liability, unless

we are able to apportion the damage done by each dog. The impossibility of doing so is manifest. It cannot be done unless some arbitrary rule is adopted, as was done in a few of the cases cited by the defendant: *Partenheimer v. Van Orden*, 20 Barb. 479; *Powers v. Kindt*, 13 Kan. 74. ⁴⁸⁰ In *Wilbur v. Hubbard*, 35 Barb. 303, two dogs killed sheep of the value of nineteen dollars. The dogs were of unequal size, and, the defendant's being the larger, a verdict for twelve dollars against him was sustained on the ground that the jury had a right to say that the smaller dog did not do as much damage as the larger one.

We must decline to follow the rule laid down by these cases. It is quite contrary to the terms and spirit of the statute. When these things are considered, it is but reasonable to hold that each owner of a dog engaged in doing the damage is liable for the whole amount of damage done. Any other holding would tend to emasculate the statute and deprive the sheep owner of the protection the statute was designed to give. Suppose two dogs, with different owners, together attack and frighten a traveler's horse, and damage ensues; under the rule sought to be invoked, the injured party could recover a fraction of his damages from one owner, to be measured according to the size of his dog, and the remainder from the other. This hardly accords with the true meaning and intent of the statute. The construction given the statute by the trial court, and here approved, finds support in the following cases: *Kerr v. O'Connor*, 63 Pa. St. 341; *Worcester Co. v. Ashworth*, 160 Mass. 186, 35 N. E. 773.

By the Court. The judgment of the circuit court is affirmed.

INJURY BY DOGS OWNED BY SEPARATE OWNERS—LIABILITY.—If two dogs kill sheep in company, but the dogs belong to separate owners, each owner is not answerable for the injury done by the other's dog, where the mischief is done without the knowledge or consent of the owners: *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690, and note showing that a joint liability cannot arise where an injury is done by animals owned by different persons.

ILLINOIS STEEL COMPANY v. BUDZISZ.

[106 Wis. 499, 81 N. W. 1027.]

PLEADING—AMENDMENT—ABUSE OF DISCRETION.—Under a statute allowing pleadings to be amended, "in furtherance of justice," the exercise of the power to permit amendments rests in the sound discretion of the court, and will not, on appeal, be disturbed for an abuse of discretion, where it had, in view of the facts, some reasonable ground to support it. The legal presumption is that there was such ground until the contrary appears.

PLEADING—AMENDMENT—IMPOSITION OF TERMS.—The statute of Wisconsin allowing pleadings to be amended upon "such terms as may be just," does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend a pleading. If there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for, it cannot be said, on appeal, that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law.

PLEADING—AMENDMENT WITHOUT IMPOSITION OF TERMS—ABUSE OF DISCRETION.—If the attorney for the defendants in ejectment fails by mistake to plead the statute of limitations for his clients, who are poor people, unacquainted with legal matters, and other attorneys are substituted, after the lapse of some twenty-one months, who at the trial offer an amended answer curing the omission, there is no abuse of discretion for the court, without the imposition of terms, to allow an amendment pleading title by adverse possession, where the only objection made to it is want of power in the court to permit it.

ADVERSE POSSESSION—TITLE—ACTUAL OCCUPANCY of land, to the exclusion of the true owner, for the statutory period, is all that is necessary to preclude such owner from thereafter reclaiming the property. It only requires an actual, hostile, exclusive occupancy of land, without any presumption or claim of right, to satisfy the limitation statute as to adverse possession.

ADVERSE POSSESSION—APPLICATION OF STATUTES.—An actual, hostile, exclusive occupancy of land does not, before the expiration of the period prescribed by the statute of limitations, constitute any estate or interest in the land, nor is the substitution of another occupant, to continue the dispossession of the true owner, the transfer of any such estate or interest within the meaning of a statute concerning the creation and transfer of an estate or interest in land. Such a statute is entirely independent of the statute of limitations.

ADVERSE POSSESSION—TACKING POSSESSIONS—PRIVITY.—While the possession of several distinct occupants of land, lasting for a continuous period of twenty years, cannot be united to satisfy the statute of limitations, successive possessions, each reaching to and uniting with the one that follows it, by privity between the occupants, so as to render the possession of the property continuous from the first entry to the end of the period of twenty years, satisfies the statute.

ADVERSE POSSESSION—TACKING POSSESSIONS—PRIVITY—SUFFICIENCY OF TRANSFER.—A paper transfer is not necessary to connect adverse possessions of successive occupants of land together for the purpose of the statute of limitations.

It is sufficient if one occupant receives his possession from another by the act of the latter or by operation of law. Hence, a parol transfer of possession by one to another, as the former goes out of, and the latter goes into, possession, satisfies the essential of privity to tack the possessions together.

Ejectment against Budzisz and wife. The original answer interposed a general denial, the attorney of the defendants failing, by mistake, to plead the statute of limitations. About twenty-one months after the action was commenced, the case was brought to trial by substituted attorneys, who, before the jury was impaneled, obtained an amendment to the answer, setting up the statute of limitations. It appeared that, more than twenty years prior to the commencement of the action, one John Skoczek had inclosed the land, built a house thereon, and thereafter occupied it continuously until about 1886, when he transferred the premises and the possession thereof to the defendant Budzisz, for a valuable consideration. Budzisz continuously occupied the premises thereafter down to the time of the trial. The trial court held that Skoczek and his successor had continuously occupied the property for more than twenty years before the action was commenced; and that its parol transfer from the former to the latter, and the latter's entry under the former, pursuant to such transfer, made the adverse possession of the premises exclusive and uninterrupted from the time that possession was taken by Skoczek. A verdict was directed in favor of the defendants and the plaintiff appealed from the judgment rendered thereon.

Van Dyke & Van Dyke & Carter and W. E. Carter, for the appellant.

Fiebing & Killilea, M. C. Krause, and O. J. Fiebing, for the respondents.

502 MARSHALL, J. Two questions are presented for consideration: 1. Did the trial court err in allowing the amendment pleading title by adverse possession? 2. Did the possession of the second occupant, under the circumstances, continue the possession of his predecessor so as to satisfy the statutory call for an uninterrupted twenty years' continuous adverse possession?

1. Section 2830 of the Statutes of 1898 says: "The court may, upon the trial . . . in furtherance of justice and upon such terms as may be just, amend any pleading . . . by correcting

. . . . a mistake in any respect, or by inserting other allegations material to the case." The power to grant amendments under the statute is very broad, and its exercise rests solely in the sound discretion of the trial court, whose decision ⁵⁰³ cannot be disturbed except for a clear abuse of judicial power: *Phoenix etc. Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151; *Smith v. Dragert*, 61 Wis. 222, 21 N. W. 46; *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263. The only limitation upon the power of the court, in cases where it may be exercised under any circumstances, and it is conceded this case is within the statute, is that it must be in furtherance of justice: *Smith v. Smith*, 19 Wis. 522; *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263. That is, the power must be exercised to that end, and there must be some reasonable ground for saying that such was the motive. The only condition of the exercise of the power is that it must be on such terms as may be just in the judgment of the trial court. Necessarily, there is no rule by which the presence of the statutory motive for the exercise of the power, or the sufficiency of the condition attached to it, can be tested, except that the act and the condition must be within the bounds of reason as applied to the particular case; and there is no rule on appeal by which to test the judgment of the trial court, except that it must have some reasonable ground to support it in view of the facts, and the rule that the legal presumption is that it has such ground till the contrary is made to affirmatively appear.

What has been said, with the brief reference to the facts upon which the amendment was allowed, will furnish a basis for a right conclusion regarding the question presented.

The defendants were evidently poor people, unacquainted with legal matters. The failure to plead the defense of the statute of limitations was the mistake of their attorney. After the case had been pending for considerably more than a year, defendants concluded that their interests required the employment of other attorneys, and they acted accordingly, resulting in the substitution, for the attorney who interposed the answer, of those who now represent them. The substitution took place April 15, 1899. Three days ⁵⁰⁴ thereafter the amended answer was drawn. The motion for leave to file it was heard without objection for want of notice, and was granted without objection, except that "the defense of the statute of limitations cannot be set up by amendment," and that the amendment, "under the circumstances, is not permissible." We take it that the language of the objection, "the amendment under the circum-

stances is not permissible," was merely explanatory of the language, "the statute of limitations cannot be set up by amendment." So it will be seen that the only objection raised to the amendment was want of power in the court to permit it. All other objections were in effect waived. Counsel for appellant now concedes that the court had ample power in the premises. They could not seriously contend otherwise, since it has been so held even in tax title cases, where a much more stringent rule prevails than in cases like this, even after a reversal on appeal: *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263; *Smith v. Dragert*, 61 Wis. 222, 21 N. W. 46.

But it is said the court exceeded its discretionary power by granting the amendment without terms, attention being called to *Morgan v. Bishop*, 61 Wis. 407, 21 N. W. 263, where there was a reversal on that ground, and *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317, where affirmance was grounded on the fact that terms of the amendment were imposed. Both cases differ materially from this, in that, after a failure on one trial by a reversal in this court, a new defense was interposed by amendment. It was in regard to that situation that Mr. Justice Lyon, in *Smith v. Dragert*, 65 Wis. 507, 27 N. W. 317, said the general rule, in ordinary cases, is conceded to be that the party amending his pleading will be required to pay all taxable costs up to the time of granting leave to amend, and motion costs. Such is the rule where a new defense is set up for the purposes of a new trial, as in that case.

The statute does not, under all circumstances, require the imposition of terms as a condition of granting leave to amend ⁵⁰⁵ a pleading. The whole subject, as to the justice of the amendment, and whether it shall be granted upon condition, and if so what condition, is left to the sound discretion of the trial judge. The imposition of terms has a twofold object—the infliction of a penalty for the negligence requiring a remedy by the amendment, and to give to the adverse party an equivalent for the injury to him by delay or increased expense because of the amendment. Where there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for—even the calling of adverse counsel into court for the purposes of the amendment, as was the situation in this case—it cannot be said on appeal that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule

of law: *Schaller v. Chicago etc. R. R. Co.*, 97 Wis. 31, 71 N. W. 1042; *Carroll v. Fethers*, 102 Wis. 436, 78 N. W. 604.

2. The main contention made by appellant's counsel is that the parol transfer by the first to the second occupant of the property, and his succession in possession under it, was not effectual to unite the two possessions into one continuous uninterrupted possession referable to the first entry, and existing thereafter for twenty years. We are referred to section 2302 of the Statutes of 1898, which provides that: "No estate or interest in lands, other than leases for a term not exceeding one year . . . shall be created, granted, assigned, surrendered, or declared unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, surrendering, or declaring the same or by his lawful agent thereunto authorized by writing." It is said by way of emphasizing or in support of such contention that the learned circuit judge expressed a personal opinion that, under such section, lands acquired by adverse possession cannot be transferred by parol, but a judicial opinion to the contrary, in harmony, as he supposed, with the decisions of this court. If that be so, we are compelled to say the learned ⁵⁰⁶ judge was wrong as to the holdings of this court, and counsel in error in supposing there is any such difficulty as the trial court supposed in the way of his recovering in this case. Such errors spring from a misapprehension not only of the decisions of this court, but of the effect of an act creating privity between successive adverse possessors of property as regards the statute of limitations.

The transfer of property acquired by adverse possession is one thing, and the preservation of a condition of property as to adverse occupancy, which if permitted to continue long enough will divest the actual owner thereof of title and vest it in the adverse occupant, is quite another thing. The two things should not be confused, otherwise the statute referred to will be erroneously applied.

Title to property, acquired by adverse possession, is of the same nature as any other, and either is plainly governed by the statute as regards the manner of its transfer; but the mere fact that a person is so circumstanced, as regards realty, as to dispossess the owner thereof adversely, does not, till the expiration of the statutory limitation upon the right of such owner to reclaim that possession, vest any estate in lands, within the meaning of section 2302, in such possessor, nor is the substitution of another in his place, to continue the dispossession of the

true owner, the transfer of any such estate. Section 2302 and section 4207 of the Statutes of 1898, the limitation statutes, are entirely independent of each other; so the essential premise upon which the argument of the learned counsel for appellant is based does not exist.

We come down to the question of whether privity can be created between successive possessors of realty, so that two possessions blended into one, continued for a sufficient length of time, will satisfy section 4207 of the Statutes of 1898, which provides that: "No action for the recovery of real property or the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seised ⁵⁰⁷ or possessed of the premises in question within twenty years before the commencement of the action." It will be noted that the plain reading of the statute, as this court has heretofore decided, is that actual occupancy of the land, to the exclusion of the true owner for the statutory period, is all that is necessary to preclude such owner from thereafter reclaiming the property: *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Wollman v. Ruehle*, 100 Wis. 31, 75 N. W. 425; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720. There are many other decisions, in this state and elsewhere, to the same effect, but they need not be cited here, inasmuch as this court has so recently, several times, on full consideration of the subject, construed the statute.

Is a paper transfer, evidencing a change of possession by succession, necessary to blend the first possession into the second—tack them to each other, as it is called? In that, we adhere to what was said by the court, speaking by Mr. Justice Pinney, in *Allis v. Field*, 89 Wis. 327, 62 N. W. 85, and *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178, to the effect that, though the possession of several distinct occupants of land, lasting for a continuous period of twenty years, cannot be united to satisfy the limitation statute, successive possessions, each reaching to and uniting with the one that follows it, by privity between the occupants, so as to render the possession of the property continuous from the first entry to the end of the period of twenty years, satisfies the statute, and a parol transfer of possession by one to another, as the former goes out of and the latter goes into possession, satisfies the essential of privity to tack the possessions together.

The authorities all agree that privity between successive possessors is all that is necessary to render them continuous, if the

possession be in fact actual and adverse. That privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry. It may be created by lease, as between ⁵⁰⁸ landlord and tenant, or by descent by operation of law from ancestor to heir, or by conveyance, either by parol or otherwise, from vendor to vendee: 1 Am. & Eng. Ency. of Law, 2d ed., 842, and cases cited in the notes; *McNeely v. Langan*, 22 Ohio St. 32; *Haynes v. Boardman*, 119 Mass. 414; *Witt v. St. Paul etc. R. R. Co.*, 38 Minn. 122, 35 N. W. 862; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Vance v. Wood*, 22 Or. 77, 29 Pac. 73; *Crispen v. Hannavan*, 50 Mo. 536; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835; *Menkens v. Blumenthal*, 27 Mo. 198. The above cases, many of which are referred to in the briefs of counsel, are but a few of the authorities that might be cited to support the doctrine stated. It seems to be conceded by appellant's counsel that many of such authorities are directly contrary to its position, but claim is made that they do not apply by reason of the statute (section 2302), which, as we have indicated, does not apply to the facts of this case.

Only a few authorities that can be found are out of line with those cited. They are in harmony with elementary principles as laid down in the text-books. The doctrine is found as clearly stated, perhaps, as anywhere in 2 Ballard's Annotations on Real Property, section 25, cited by respondent's counsel, the following language being used: "Successive possessions may be tacked together so as to form a continuous and uninterrupted possession for the essential period of time. There must be a privity existing between the parties transferring the possession. Such possession may begin in parol without deed or writing and may be transferred from one occupant to another by parol bargain and sale accompanied by delivery. All that the law requires is continuity of possession where it is actual; and this continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual delivery of the possession." The doctrine is stated in 2 Pingrey on ⁵⁰⁹ Real Property, section 1193, thus: "Continuity is an indispensable element of adverse possession; but several possessions may be tacked together where they can be referred to the original entry. No paper evidence of a transfer of possession is necessary when the holding is under claim of the first entryman."

The discussion of this subject and citation of authorities might be continued to great length. It will be noted that in every treatment of the matter, whether by text-writers or in judicial opinions, it is said that all that is necessary, where there is continuity of possession in fact, to connect the several parts of it, where there are such parts, so as to blend them into one term, continuous from first to last, is that there be privity between the persons as one succeeds to the other. Privity in such a case is the same as in any other, and it may be created in the same way. It is merely a succession of relationship in the same right to the same thing: 1 Greenleaf on Evidence, secs. 189, 523; Hart v. Moulton, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599. All that is necessary to privity between successive occupants of property, and in regard thereto, is that one receive his possession from the other by act of such other or by operation of law.

If a person, not the true owner, but hostile to him, be in actual possession of a part of a larger tract of land, under a deed describing the whole, in law he is in actual possession of the whole for the purposes of the statutes of limitation, though as to a part the possession be in fact only constructive. In that situation it is said, and it is the law, that the adverse possession cannot extend beyond the calls of the deed, meaning thereby that actual possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but if land be actually occupied beyond the calls of the deed hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. There was ⁵¹⁰ such an occupancy in Wollman v. Ruehle, 104 Wis. 603, 80 N. W. 919, and the point was directly decided in Bishop v. Bleyer, 105 Wis. 330, 81 N. W. 413. The full legitimate effect was given in those cases to the rule that the possession under a deed cannot be extended beyond its calls. Full effect was also given to the presumption that a person so circumstanced only intends to claim what his deed calls for, and the further presumption that the land, as to which the occupant has no title, he holds consistent with the title of the true owner. The first presumption, however, was rebutted by clear proof that the occupant claimed that the disputed tract was in fact within the calls of his deed. The second was rebutted by clear proof that the possession was actual and hostile to the true owner. Such presumptions yield to proof, like any other presumption of

fact, or facts otherwise established. It is the facts, when established, that govern.

Circumstances similar to those last above described were presented in *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914; *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551; *Ablard v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745; *Sheppard v. Wilmott*, 79 Wis. 15, 47 N. W. 1054; *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89; *Fuller v. Worth*, 91 Wis. 406, 64 N. W. 995; *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178. The first of such cases ruled the others. It was there held that adverse possession of property by a person, beyond the calls of his deed, did not unite with a similar possession held by his vendee. But it will be noted that there is nothing in the opinion indicating that a written transfer of the outside property was a statutory requisite to privity between two successive possessions. The case turned on rules of evidence, applied with a severity, it must be admitted, almost precluding in such cases, proof of the fact of privity other than by a written transfer. The *Graeven* case, as will be seen, was misapprehended and extended by the other cases cited. However, the idea now suggested, that a written transfer is a statutory requisite to privity under section 2302, was not thought of.

Such stress was laid, in the *Graeven* case, on the presumption ⁵¹¹ that occupation by one of premises not his own is in subordination to the title of the true owner, and the rule that adverse possession must be strictly construed and that every reasonable presumption (it will be noted that in some of the cases the word "reasonable" was left out in stating the rule) is to be made in favor of the true owner—that such presumptions resisted the logic of facts that would seem to leave no room for a conflicting reasonable inference. Yet it is plain that the court did not there, or in the more recent cases which followed, deem the fact of privity entirely closed to proof except by a written transfer. The case did not go upon the theory that paper evidence, to create privity between adverse possessions, is necessary, but upon the theory that adverse possession and all facts tending to establish it must be construed so strictly in favor of the true owner that succession to actual possession of lands, a part of which was transferred by deed, though the part within and that without the calls of the instrument constitute one entire property, will not, for the purposes of adverse possession, overcome the presumption, arising from the limitations of the deed, that the vendor only transferred to his vendee possession of the land within its calls. That is out of harmony with *Wollman v.*

Ruehle, 104 Wis. 603, 80 N. W. 919, and many other cases in other courts that might be cited. It is out of harmony with the statute that continuous disseisin for twenty years turns the presumptions against the true owner, and repeated decisions in recent years in harmony with the statute: *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919. That this court did not intend to hold that a paper transfer is essential to privity between possessions for the purposes of the statute of limitations, is clear. It has not been so understood, as indicated in *Ryan v. Schwartz*, 94 Wis. 403, 69 N. W. 178, and *Allis v. Field*, 89 Wis. 327, 62 N. W. 85, where *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914, and the cases ruled by it were referred to as authority, and it was ⁵¹² distinctly said that a paper transfer is not essential to the tacking of adverse possessions together.

In *Dhein v. Beuscher*, 83 Wis. 316, 53 N. W. 551, speaking of a chain of title by successive possessions, the land being beyond the calls of the paper transfer, it was said: "The deeds fail to show privity." That was obviously correct. The deeds of themselves did not show privity as to any land except that within the calls of the deeds, but that did not prevent the fact, if it were a fact, that the property was bought as a whole—there being an actual succession of possession pursuant to the purchase and hostile to any other right—being of sufficient probative power to establish privity. The case most clearly out of harmony with the idea that *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914, only laid down a rule of evidence not intended to preclude a parol creation of privity between possessions, and clearly inconsistent with the idea that the essential of privity can be created by parol, accompanied by actual succession in possession, is *Ablard v. Fitzgerald*, 87 Wis. 516, 58 N. W. 745. There Mr. Justice Newman said, speaking for the court, and to the vital point in the case: "The defendant is without a chain of paper title. It does not appear that he has a deed conveying the disputed strip to him. The disputed strip is outside the forty acres. Without such a conveyance it is difficult to see how he can connect his own possession to the possession of his predecessor so as to make the adverse possession continuous. Without a deed of the strip it seems that the defendant can claim no right to the land founded upon adverse possession of his grantor. This seems to be the effect of *Graeven v. Dieves*, 68 Wis. 317, 31 N. W. 914." Language to the same effect was used in *Elofr-*

son v. Lindsay, 90 Wis. 203, 63 N. W. 89, and Fuller v. Worth, 91 Wis. 406, 64 N. W. 995; but the error in those cases, without directly overruling them, was largely corrected in Ryan v. Schwartz, 94 Wis. 403, 69 N. W. 178, and such error expressly discarded in Wollman v. Ruehle, 104 Wis. 603, 80 N. W. 919, and Bishop v. Bleyer, 105 Wis. 330, 81 N. W. 413, thereby bringing the law ⁵¹³ into harmony with what was really intended in the Graeven case, and softening the rule of evidence so as to harmonize with the generally accepted doctrine on the question and the statute, both of which had been departed from.

Further discussion of the subject is unnecessary. Sufficient has been said to bring out clearly the true doctrine as understood by the court, that a paper transfer is not necessary to connect adverse possessions together; that privity, successive relationships to the same thing, is the connecting link; that a paper transfer is but a means of establishing the fact of privity, but not the only evidence; that the presumption that a person in possession of land who conveys part of it and transfers possession of the whole intended to transfer only that within the calls of his conveyance, and the presumption that a person in possession, not as owner, holds subject to the true owner, are mere rebuttable presumptions of fact that yield to any clear relevant evidence to the contrary, whether it be written, or inferential from facts established by positive evidence: Meyer v. Hope, 101 Wis. 123, 77 N. W. 730.

We might almost call the roll of the courts on that doctrine. The Missouri court said: "We know of no rule that requires written evidence to establish the fact of privity": Menkens v. Blumenthal, 27 Mo. 198. The Illinois court said, that where the owner, in possession of a strip of land, together with adjoining land, conveys the latter and transfers possession of the whole, and the grantee takes possession of the property as an entirety, the possession of that outside the calls of the deed being actual in both possessors, the presumptions in favor of the true owner and as to the limitations of the deed give way to the facts, and privity in adverse possession is established: Faloon v. Simshauser, 130 Ill. 649, 22 N. E. 835. The Alabama court said that where a person holds land adversely, outside the calls of his deed, claiming a continuity of such possession from his grantor, the presumption that the latter only intended to create privity to the extent ⁵¹⁴ of the calls of the deed may be overcome by proof that the former obtained possession of the property from the latter as a part of the land purchase, because a

paper transfer to continue adverse possession in privity is not necessary: *Dothard v. Denson*, 72 Ala. 541. To the same effect are *Erck v. Church*, 87 Tenn. 575, 11 S. W. 794, and *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871. A few cases, it is conceded, are out of line with the doctrine stated.

Much difficulty experienced in regard to the law of title by adverse possession will be avoided by referring and adhering to the statutes where they cover the subject, and not treating rules of evidence as rules of law. The following recapitulation of principles necessarily or incidentally referred to in this opinion may be an aid to that end:

1. Adverse possession should be strictly construed, all reasonable presumptions being made in favor of the true owner, including the presumption that actual possession is subordinate to the right of such owner; but such strict construction and such presumptions are subject to the following limitations.

2. Good faith by the adverse claimant as to his right at the instant of entry, or during the limitation period, is not necessary, because the statute, by its terms, only requires actual, continuous, exclusive possession under such circumstances as to wholly dispossess the true owner both actually and constructively.

3. Actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumptions in favor of the true owner, and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites to title by adverse possession, and that the title of the adverse claimant is perfect. The statute so provides.

4. The letter of the statute requires only such adverse possession as will continuously exclude the true owner from ⁵¹⁵possession, whether actually or constructively, during the entire limitation period; that is, so far as the letter of the statute goes, a person in possession can successfully defend such possession against the true owner when he has been entirely excluded from possession for twenty years.

5. By judicial construction, now a rule of property, the statute does not apply unless the exclusion of the owner from possession has been during the whole period by a single hostile possession, exercised either by one or more persons acting together, or by possessions in succession connected by privity between the actors.

6. A transfer to connect successive possessions, in conformity to section 2302 of the Statutes of 1898, is not an essential to the

privity necessary to continue the mere dispossessed condition of the true owner.

7. Privity denotes merely a succession of relationship to the same thing, whether created by deed or by other act, or by operation of law. If one, by agreement, surrender his possession to another, and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the time the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one, and the limitation period upon the right of such owner to reclaim the land is thereby continued, because, by the statute, as construed, the only essential to such continuity is that the dispossession of the true owner be actually continued.

8. The calls of a deed, when title by adverse possession is claimed, limit the right as a matter of law: (a) Where the ten-year statute, relating exclusively to claims of title founded on written instruments, is relied on; (b) As to the extent which actual possession of a part will draw to it constructive possession of the whole; (c) The extent to which title can be claimed by adverse possession under the instrument itself.

514 9. The calls of the deed limit the right as a presumption of fact, where a person is in possession of lands outside of but adjacent to and together with lands within the calls of his deed; also where a person, being so circumstanced, by written instrument conveys the lands within such calls to another, and surrenders to such other possession of the whole.

10. The first presumption last above mentioned yields to clear, relevant evidence showing that the possession outside the calls of the deed was not characterized by any recognition of the true ownership, whether that occur by mistake of boundaries or distinct hostile intention. The second of such presumptions yields to clear evidence that the premises were taken from a predecessor in possession as part of the property purchased, and that the two possessions so intentionally united were physically united by the successor going into possession at or before the time his predecessor went out of possession.

By the Court. The judgment of the circuit court is affirmed.

ON MOTION FOR A REHEARING counsel for the appellant contended that, not only is possession of land title to it, but such an interest therein that a parol contract to buy or sell such possession is within the statute of frauds and void, the argument being that if possession of realty is an interest therein, it could not be

transferred without complying with the statute concerning the creation and transfer of an estate or interest in land, and which required a writing; but the court, speaking by Marshall, J., still maintained that the statute concerning the creation and transfer of an interest in land is independent of the statute of limitations as to adverse possession and title by prescription; that the limitation statute deals only with the fact of continued disselsin of the true owner for the statutory period, regardless of whether it is by a person claiming rightful possession or not; that while possession with a claim, or the legal presumption of right, is evidence of an interest in land, it only requires an actual, hostile, exclusive occupancy of land, without any presumption or claim of right, to satisfy the limitation statute; and that privity may be based on an oral authorization of the successor in possession to take the place of his predecessor. The motion was therefore denied.

PLEADING—AMENDMENT.—The power to allow amendments to pleadings is, in a large degree, in the discretion of the court, and should be liberally exercised in the furtherance of justice; but when an application to amend is resisted, it should not be granted, except upon good cause shown, and upon such terms as the justice of the particular case may require: *Saint v. Guerrero*, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335. Compare *Radam v. Capital Microbe etc. Co.*, 81 Tex. 122, 26 Am. St. Rep. 783, 16 S. W. 990.

TITLE BY PRESCRIPTION.—A MERE NAKED POSSESSION for twenty years will bar an ejectment if such possession is adverse and hostile: *Gay v. Moffit*, 2 Bibb, 506, 5 Am. Dec. 633. To constitute an adverse possession, it is only necessary for a person to enter and take possession of land as his own: *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680. Actual, notorious, continuous, and exclusive possession of land for the period prescribed by the statute of limitations gives a good title: *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122. Adverse possession for more than twenty years is a sufficient bar to an action of ejectment: *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 179; and see *Stearns v. Hendersass*, 9 Cush. 497, 57 Am. Dec. 65. One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same: *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522.

TITLE BY PRESCRIPTION—TACKING POSSESSIONS—PRIVITY.—A title by adverse possession and enjoyment may be created by uniting several possessions, provided there is a privity of estates, but there is a privity where the latter holder takes under the earlier by a voluntary transfer of possession: Note to *Rembert v. Edmondson*, 63 Am. St. Rep. 821.

STATUTE OF LIMITATIONS—UNITING ADVERSE POSSESSIONS BY ORAL CONTRACT.—The continuity of possessions by several holders may be effected by a verbal transfer of right and actual transfer of possession from one to another, without a writing, so as to perfect a title by prescription: *Ramsey v. Glenney*, 45 Minn. 401, 22 Am. St. Rep. 736, 48 N. W. 322; *Rembert v. Edmondson*, 99 Tenn. 15, 63 Am. St. Rep. 819, 41 S. W. 935.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

WILLIAMS v. LONG.

[130 Cal. 58, 62 Pac. 264.]

APPEAL—LIMITATION OF TIME—JURISDICTION.—Statutes limiting the time of appeal are jurisdictional and mandatory, and in the absence of express authorization therein, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake.

STATUTE OF LIMITATIONS—SUBSEQUENT DISABILITY.—Except as modified by positive enactment, no subsequent disability will suspend the operation of the statute of limitations after it has begun to run.

APPEAL—LIMITATION OF TIME—DEATH OF RESPONDENT.—No appeal can be taken from a judgment after the statutory period has elapsed, notwithstanding the fact that the respondent died eighteen days before such period had expired, and only after the expiration of six months was an administratrix of his estate appointed, upon whom service with due diligence could be made.

F. W. Street, Percy V. Long, and C. C. Hamilton, for the appellants.

F. P. Otis, for the respondent.

59 HENSHAW, J. This is a motion to dismiss defendant's appeal from the judgment, upon the ground that the appeal was taken after the statutory period had elapsed. This fact is not denied, but in resisting the motion it is shown that some eighteen days before the expiration of the six months allowed for appeal the plaintiff, in whose favor the judgment was rendered, had died, and that only after the expiration of the six months was an administratrix of his estate appointed, upon whom ser-

vice with due diligence was made. Under this showing it is contended that the running of the statute of limitations should be held to have been suspended from the date of the death of plaintiff to the date of the appointment of his personal representative.

Statutes limiting the time of appeal are jurisdictional and mandatory: *Henry v. Merguire*, 111 Cal. 1, 43 Pac. 387. In the absence of an express authorization in the statute itself a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. No such authorization is found in the statutes of this state. In this case the statute had begun to run, and had been running against this appellant for more than five months before the death of the plaintiff. It is a well-settled rule and principle of law, except as modified by positive enactment, that when the statute of limitations has begun to run no subsequent disability will suspend its operation. In *Pace v. Ficklin*, 76 Va. 292, the time in which an appeal should have been taken was limited to two years. Judgment was rendered against an assignee in bankruptcy, and during the two years the assignee died and a successor was appointed. In support of the appeal it was urged that the period between the death of the first assignee and the appointment of his successor⁶⁰ should be deducted from the statutory time. But the court said: "In answer to this it is sufficient to say that the statutes defining and limiting the right of appeal make no such exception or restriction, and there is no rule or principle in law which authorizes the courts to do so. . . . In this case Pace was alive at the date of the decree. The limitation then commenced to run, and so continued, notwithstanding his death at a subsequent period."

The motion to dismiss is granted.

McFarland, J., Van Dyke, J., Harrison, J., and Temple, J., concurred.

APPEAL.—A STATUTE LIMITING THE TIME of appeal is jurisdictional, and such time cannot be enlarged by the court nor by agreement of the parties: *Daley v. Anderson*, 7 Wyo. 1, 75 Am. St. Rep. 870, 48 Pac. 839.

LIMITATION OF ACTIONS.—DISABILITIES OCCURRING after the accruing of a cause of action do not stop the running of the statute of limitations: *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Broadfoot v. Fayetteville*, 124 N. C. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

BATES v. HALSTEAD.

[130 Cal. 62, 62 Pac. 305.]

PUBLIC LAND—SWAMP LAND—PART OF SECTION NOT INCLUDED IN PLAT—CONCLUSIVENESS OF DETERMINATION.—Where the greater portion of a section of government land is platted and listed to a state as swamp and overflowed land, the remaining lots are government land, for their exclusion from such platting and listing is a determination to that effect.

PUBLIC LANDS—SWAMP LAND—IRREGULAR PLATTING—CONCLUSIVENESS OF DETERMINATION.—ALTHOUGH AN ACT OF CONGRESS contemplates that the selection, platting, and listing of public lands to a state as swamp and overflowed lands shall comprise only legal subdivisions of land, nevertheless a plat which divides land into legal subdivisions to a great extent, yet bounds some of its sides by an exterior meandering line, which line includes within its limits the smaller portion of some subdivisions and the larger portion of others, is a conclusive adjudication by the land department that all of the lands so platted and listed are swamp and overflowed, and that all of the lands excluded from the plat are not swamp and overflowed, but belong to the United States.

PUBLIC LAND—SWAMP LAND—FEDERAL PATENT TO SMALLER PART OF LEGAL SUBDIVISION.—A patent from the United States of the smaller part of a legal subdivision of land, which part is not included in a plat to the state as swamp and overflowed land, will prevail over a state patent granting the larger part of the same legal subdivision, this part alone being platted and listed to the state as swamp and overflowed land.

PUBLIC LAND—SUIT TO QUIET TITLE—MISTAKE OF LAND DEPARTMENT.—In a suit by the holder of a United States patent to quiet his title against the holder of a state patent, a mistake of the land department in the manner in which the land was platted and listed to the state cannot be reached.

Freeman & Bates and Hannah & Miller, for the appellant.

Charles G. Lamberson, for the respondent.

⁶³ **GAROUTTE, J.** This action is brought to determine adverse claims to certain real estate, described as lots 1 and 2 in section 32, township 8 south, range 24 east, comprising about thirty-one acres of land. Plaintiff relies upon a patent from the United States issued to his grantor; and defendant relies upon a patent from the state under the swamp and overflowed act of Congress, passed September 28, 1850. No evidence was introduced as to the character of the land in dispute, and the question here presented resolves itself into the proposition, as to whether or not these lands were ever platted and listed to the state as swamp and overflowed land under the aforesaid act of Congress.

The greater portion of the said section 32 was platted and listed to the state as swamp and overflowed land, and under the authority of *McCormick v. Hayes*, 159 U. S. 347, 16 Sup. Ct. Rep. 37, it must be held that if this land was not selected and listed to the state when the other portions of the section were selected and ⁶⁴ listed, then it is government land, for such selection and listing is a determination to that effect. It is there said: "In the case now before us the selection by Lynn county, grantee of the state, prior to 1875, of swamp and overflowed lands in the very section of which the lands in dispute formed a part, without including the latter in such selection, together with the acquiescence in that selection by the interior department, and the selection by or under the direction of the secretary of the interior, and their certification to the state, first in 1858 and again in 1881, of the lands in dispute, as lands inuring under the act of Congress of May 25, 1856, to the Cedar Rapids and Missouri River Railroad Company, and, therefore, not lands embraced by the act of 1850, constituted a determination based on 'observation and determination' that the lands here in dispute were not swamp and overflowed."

Were these lands selected, platted, and listed as swamp and overflowed lands? Section 3 of the act of Congress of 1850, referring to the duty of the secretary of the interior, is as follows: "And be it further enacted that in making out a list and plats of the lands aforesaid all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom." It seems this section clearly contemplates that these lists and plats should comprise legal subdivisions of land only, but in the case at bar the plat comprises a large tract of land divided into legal subdivisions to a great extent, yet bounded upon some of its sides by an exterior meandering line. And it appears from the plat that various forty acre subdivisions are divided by this meandering line, a majority in acreage of many of these subdivisions being without the meandering line, and a majority in acreage of many of them being within the limits of the line. Our attention has been called to no authority justifying this manner of making a plat, and we find nothing in the act even suggesting a meandering line which shall form the exterior boundary line of the land designated upon the plat as swamp and overflowed lands. Upon the contrary, the section of the act quoted clearly con-

templates a different course of action upon the part of the ⁶⁵ government officials. In this case these fractional lots 1 and 2 are outside of this meandering line and comprise about twelve and eighteen acres, respectively, in two different forty acre legal subdivisions of said section 32. This being their status, it is contended upon the part of respondent that, as matter of law, they are swamp and overflowed lands by reason of the provision of section 3 of the act of Congress already quoted.

We cannot bring ourselves to agree with the foregoing contention of respondent, for, upon the very face of the plat itself, the entire large tract of land within the meandering line appears, both by the color of the plat and the indorsements made thereon, to be swamp and overflowed lands. And, beyond this, the list of swamp and overflowed land in said section based upon said plat and returned to the state does not include the land here in controversy. Even if there be some doubt as to the intention of the government arising from the construction to be given the plat by reason of this meandering line dividing forty acre tracts, still there is no doubt but that the land in controversy was not listed to the state when the other portions of the same section were listed. This fact also indicates that the government officers placed a different construction upon the meaning of the plat from that which respondent here seeks to maintain: See *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. Rep. 124.

If the construction of respondent as to the meaning of this plat be a sound one, then all those portions of forty acre tracts situated within the meandering line, not amounting to twenty acres, are not swamp and overflowed lands, and do not belong to the state. Yet the plat, as we have shown, indicates explicitly in two distinct ways that all the land within the meandering line is swamp and overflowed land, and presumably all of that land has been listed to the state as such. For these reasons it would seem that the status of all these fractional pieces of land within the meandering lines must be deemed forever settled by the acts and adjudications of the land tribunal. Yet there can be no question but that the land here involved stands in exactly the same relation to the law as those fractional pieces within the meandering line. If ⁶⁶ the line fixes the character of the land within its limits it equally fixes the character of the land without its limits, that is, as to any forty acre legal subdivision intersected by it.

It is here a question of legal title alone between these two claimants, and even for present purposes, if it be conceded that the land department made a mistake in the manner in which the plat introduced in evidence was made, yet that mistake cannot be reached in this action.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

THE CORRECTNESS OF BOUNDARIES OF PUBLIC LANDS, as shown by the government plat and survey under which sales have been made, cannot be questioned: *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59.

FKUMOTO v. MARSH.

[130 Cal. 66, 62 Pac. 303, 509.]

ARREST IN CIVIL ACTION—JURISDICTION.—A COURT cannot confer jurisdiction by assuming it, nor can its determination that it has jurisdiction confer it. Hence, where it has in fact no jurisdiction to act, an order of arrest issued by it is void.

ARREST IN CIVIL ACTION—JURISDICTION—SUFFICIENCY OF AFFIDAVIT.—Whether a court has jurisdiction to order the arrest of a debtor must be determined from the affidavit for the arrest, and not from what the judge thinks it authorizes him to do. Hence an affidavit resting wholly or in any one essential particular on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order.

FALSE IMPRISONMENT—ARREST IN CIVIL ACTION.—An action for false imprisonment will lie against one who in a civil action secures the arrest of the plaintiff as his alleged debtor, upon an affidavit materially defective in respect to the jurisdictional facts required to be stated to bring the case within the statute providing for the arrest.

Wheaton & Kalloch, for the appellant.

Mullany, Grant & Cushing, and O. K. Cushing, for the respondent.

⁶⁷ **CHIPMAN, C.** Action for false imprisonment. Defendant demurred to the complaint for insufficiency of facts, and his demurrer was sustained without leave to amend. Plaintiff appeals from the judgment. The case turns upon the sufficiency of the affidavit in the original action of *Marsh v.*

Fkumoto, to confer jurisdiction to make the order of arrest. The arrest was caused under subdivisions 1 and 5 of section 479 of the Code of Civil Procedure. The section reads as follows: "The defendant may be arrested, as hereinafter prescribed, in the following cases: 1. In an action for the recovery ⁶⁸ of money when the defendant is about to depart from the state with intent to defraud his creditors; 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

Section 481 provides as follows: "The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. The affidavit must be either positive or upon information and belief, and when upon information and belief it must state the facts upon which the information and belief are founded."

The affidavit in question was before this court in *Ex parte Fkumoto*, 120 Cal. 316, 52 Pac. 726, and was, in the opinion then rendered, thoroughly analyzed and its defects specifically pointed out. Whether in the affidavit it was made to appear that a cause of action existed against Fkumoto without reference to the complaint in the action then pending, and whether the affidavit could be aided by such reference, were questions not decided and need not now be decided. At the hearing on habeas corpus the court determined that there was a material lack in the affidavit in respect of the jurisdictional facts required to bring the case within the statute, and we see no reason now for coming to any different conclusion. Reference to the opinion in that case will relieve us from again presenting the numerous fatal defects of the affidavit. Suffice it to say that the court determined that the facts stated in the affidavit "do not bring the case within either of the provisions of the statute relied on by respondent"; that there is no express averment in the affidavit, nor are facts stated from which a deduction may be made, that "defendant is about to depart from the state with intent to defraud his creditors." The court said: "Both the present purpose and the specific intent found in the language of the statute are wanting in the affidavit"; and it was added: "When the language of such a statute is departed from, the party must at his peril employ words of equivalent import; and a failure in this respect is fatal." It was further said that the affidavit "is equally wanting in facts to show that defendant had removed or disposed of his property, or was about to

do so, with intent to defraud his creditors." Again: "There ⁶⁹ is another fatal defect common to the entire affidavit. Several of the statements of fact are made expressly on information and belief, . . . whereas the facts upon which such information and belief are founded are in no instance given. In this," said the court, "the affidavit fails to comply with one of the express and most material requirements of the statute." And finally the court said: "As the jurisdiction to issue the warrant rests upon the affidavit, it results from what has been said that the order of arrest was void, and the warrant is no authority for petitioner's detention." Respondent seems to be of the impression that jurisdiction is aided by the pendency of the action. It is necessary to the jurisdiction that an action be pending: Code Civ. Proc., secs. 480, 483; but, as above stated, jurisdiction to make the order rests upon the affidavit.

The learned judge who heard the demurrer expressly placed his ruling upon the authority of *Dusy v. Helm*, 59 Cal. 188. We think the opinion in that case has been misunderstood. It was there said: "If the judge to whom the application was made had jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit to procure the order of arrest, the party applying for it cannot be held responsible unless there was an entire lack of evidence of some essential fact which the law requires to be shown."

That was an action to recover possession of certain personal property, and the affidavit was based upon subdivision 3 of section 479 of the Code of Civil Procedure; the statement in the affidavit was: "That the defendant in said action did, on or about October 19, 1874, fraudulently conceal and remove all said property, to prevent its being found or taken by the sheriff," etc. There was a positive averment of the facts which the statute made a ground for the arrest, and hence it was true, as stated in the opinion, that there was not entire lack of evidence of some essential fact required to be stated. In the case now here, this court has already determined that the affidavit failed in many particulars to comply with the express and most material requirements of the statute, and especially in its allegations of material facts upon information and belief without stating the facts upon which such information and belief were founded. But the statute expressly requires that when the affidavit is upon information ⁷⁰ and belief "it must state the facts upon which the information and belief are founded." We cannot agree with respondent that it is but error to be corrected on appeal where

facts are stated as was done in the affidavit before us. We think an affidavit resting wholly, or in any one essential particular, on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order: *In re Vinich*, 86 Cal. 70, 26 Pac. 528; 7 Am. & Eng. Ency. of Law, 1st ed., 682, and cases cited. It was said in *Spice v. Steinruck*, 14 Ohio St. 213: "It is clear, we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of the defendant, the course prescribed by the statute must be strictly pursued." It was further said in *Dusy v. Helm*, 59 Cal. 188: "The judge having determined, in the exercise of the jurisdiction committed to him by the law, that the affidavit by its statement of facts was sufficient to entitle the party applying in the order, to hold that such party is liable to damages for the erroneous judgment of the judge would impose on him a responsibility not warranted by law." Respondent quotes this paragraph and apparently claims that where the judge assumes jurisdiction, or has determined to exercise it, there can be no liability, for the reason that his judgment is but erroneous. But the court cannot confer jurisdiction by merely assuming it; nor can its determination that it has jurisdiction confer it. Where the judge has in fact no jurisdiction to act, his order of arrest is void; and whether he has jurisdiction must be determined from the affidavit itself and not from what the judge thinks it authorizes him to do. The plaintiff must see to it that he is clothed with actual, not merely apparent, authority before he can deprive the defendant of his liberty. When the court in *Dusy v. Helm*, 59 Cal. 188, said that there would be no liability—"the judge having determined in the exercise of the jurisdiction committed to him by the law"—the statement presupposed jurisdiction to exist; and the court did not say nor intend to say that the judge would have jurisdiction because he determined that he had it. What the court in effect said was, that as the judge had jurisdiction⁷¹ in that particular case, as it clearly had, in its exercise his determination as to the sufficiency of the facts to justify him in making the order was mere error. But it was not said, and we do not think it has ever been said, that where jurisdiction is lacking the issuance of the order would be but error. The distinction is apparent in all the cases cited by respondent, and we think is clearly admitted in *Gillett v. Thiebold*, 9 Kan.

427, relied on by respondent as "singularly similar to the case at bar," and in which Mr. Justice Brewer delivered the opinion. It was there said: "Where the statute prescribes certain conditions for the exercise of powers by an inferior tribunal, a disregard of those conditions renders the attempted exercise of those powers void." In the case we have here this court has already decided that the statutory conditions, upon which the power to act depended, were disregarded, and hence the order was void.

We do not feel called upon to further notice the very able discussion of the question found in respondent's brief. We are clearly of the opinion that the court had no jurisdiction to issue the order, and that it was so decided in *Ex parte Fkumoto*, 120 Cal. 316, 52 Pac. 726. Such being the fact, the numerous cases relied on by respondent have no application.

The judgment should be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Van Dyke, J., Garoutte, J., Harrison, J.

A petition for a hearing in Bank was filed and denied, and from the order of denial Beatty, C. J., dissented, and filed the following opinion on the 17th of October, 1900:

BEATTY, C. J. I dissent from the order denying a rehearing in this case. The decision in *Ex parte Fkumoto*, 120 Cal. 316, 52 Pac. 726, having been made by the court in Bank, is authority which the commissioner and the Department were no doubt bound to follow; but it does not establish the law of this case, and if erroneous should be set aside. I think the court in that case erroneously decided that the affidavit of this defendant failed ⁷² to state facts sufficient to give the court jurisdiction to make the order. In my opinion the affidavit contains everything necessary not only to give the court jurisdiction, but to fully justify the order of arrest. I think the judgment in this case should, therefore, have been affirmed.

FALSE IMPRISONMENT.—If the facts set forth in an affidavit for arrest in a civil action, though slight and inconclusive, yet tend to prove the charge and justify the order of arrest, no action for false imprisonment lies: See the monographic note to *Mitchell v. State*, 54 Am. Dec. 263. Void and voidable process as a protection against actions for false imprisonment is discussed in the monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 413-419.

MOORE v. MOORE.

[130 Cal. 110, 62 Pac. 294.]

ILLEGAL CONTRACTS—HOMESTEAD ENTRY ON GOVERNMENT LAND—TRUST.—An action which requires the aid of an illegal contract to support it cannot be maintained. Therefore, where a plaintiff, who was entitled to make a homestead entry upon land, entered into a contract with his son, who, without his father's knowledge or consent, had made a fraudulent entry upon the same land, which provided that the son should proceed under his entry, make proofs, and acquire title to the land for the use and benefit of his father, no suit can be maintained to enforce such a trust, since the contract was for the consummation of a fraudulent imposition upon the government.

A. L. Shinn and N. J. Barry, for the appellant.

Spencer & Raker and H. D. & G. H. Burroughs, for the respondent.

¹¹¹ HENSHAW, J. The appeal is from the judgment. The prayer of the complaint is that defendant be decreed to hold the legal title to certain land in trust for plaintiff. The material allegations of the complaint are: That plaintiff was in the possession and occupation of public land of the United States, which land was subject to homestead entry. Plaintiff was qualified to enter the land under the homestead laws, and was entitled upon so doing, and after compliance with the laws of the United States, to obtain title thereto. His son, Charles W. Moore, lived with him upon the land. In 1873, without the knowledge or consent of plaintiff, the son made a homestead entry upon the land at the United States land office. The entry was fraudulently made while the plaintiff was in the exclusive possession of the land, and while the land was not open to homestead entry by any person other than the plaintiff. The son was guilty of fraud and false representations to the officers of the land office, and his entry was illegal and void. After the entry the plaintiff, learning of it, went to his son and demanded an explanation, stating to him that his entry was irregular and illegal, to which the son replied that he had made the entry for the protection and benefit of plaintiff, and to secure ¹¹² the land for plaintiff, and to prevent any person other than the plaintiff from securing the same, and told plaintiff that if he would not object to or contest the entry he would secure the title to the lands from the United States for the use and benefit of plaintiff. The plaintiff relied upon the

promises and statements so made to him by his son, and there-upon consented that his son should proceed under his entry, make proofs, and acquire title to himself. This the son did, and the patent of the United States for the land in question was in due course issued to him. The son died without fulfilling his promise, and this action was commenced in 1896 for the purpose above indicated. A general demurrer was interposed to the complaint, which was overruled.

That demurrer should have been sustained and the action dismissed. Section 2290 of the Revised Statutes of the United States provides that every person who applies for a homestead entry must make affidavit that the entry is made for his exclusive use and benefit, and not, either directly or indirectly, for the use or benefit of any other person. By the allegations of this complaint the son of plaintiff conceived and set in active operation a fraud upon the government of the United States, by which, through flagrant perjury, he undertook to acquire title to a part of the government domain. The plaintiff, knowing this, consented that the fraud should be consummated, upon the assurance that the title acquired should subsequently be conveyed to him. He seems to think that no one was interested in the scheme other than himself and his son, and that he may be heard to complain in a court of equity because a title thus fraudulently secured from the government by false representations and perjury, to which he was a consenting party, was not afterward conveyed to him. He forgets, however, the higher interests of the general government, and overlooks the dictates of public policy. That the agreement between the father and son was for the consummation of a fraudulent imposition upon the government there can be no doubt, and plaintiff's right of recovery under his pleading looks to the enforcement of this illegal contract. As was said by Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164: "The test whether a demand connected with an illegal transaction is ¹¹³ capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." A consideration of contracts, illegal either because against the express mandate or the express policy of the law, was recently had by this court in *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. 777, to which reference may be made.

The judgment appealed from is reversed, with directions to the trial court to sustain the demurrer and dismiss the action.

Temple, J., and McFarland, J., concurred.

ILLEGAL CONTRACT.—COURTS WILL NOT ENFORCE illegal contracts nor any supposed rights founded thereon: *Bowman v. Phillips*, 41 Kan. 364, 13 Am. St. Rep. 292, 21 Pac. 230. An illegal contract creates no obligation between the parties and cannot form the basis of judicial proceedings: *Santa Clara etc. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391. Where a fraudulent transaction has been consummated between parties to an action in ejectment to the extent of vesting title in the plaintiff and leaving the possession in the defendant, the law will leave them as they are: *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71.

GRAND GROVE OF UNITED ANCIENT ORDER OF DRUIDS v. GARIBALDI GROVE NO. 71.

[130 Cal. 116, 62 Pac. 486.]

BENEFIT SOCIETIES—SUIT AGAINST DISSOLVED SUBORDINATE SOCIETY—PARTIES.—In a suit by an incorporated grand grove of United Ancient Order of Druids against a subordinate grove which has been dissolved, the defunct grove is not a proper party defendant, the individual members named being the only real defendants.

BENEFIT SOCIETIES — VOLUNTARY—NATURE.—Voluntary unincorporated societies are not bodies politic or corporations, but are mere aggregates of individuals called for convenience by a common name.

BENEFIT SOCIETIES—POWER TO HOLD PROPERTY.—Voluntary unincorporated associations cannot acquire or hold property. The property it is said to acquire is in fact the property of its members, and each member's share is his own private property.

ASSOCIATIONS—VOLUNTARY—SUITS AGAINST.—Voluntary unincorporated associations can neither sue nor be sued, and in suits where they are apparently parties, the real parties are the members of the association.

ASSOCIATIONS — VOLUNTARY—EXPULSION OF MEMBERS.—Voluntary unincorporated associations are not vested with the right of expulsion of members by the general law of the land, but by the agreement of the members as expressed in the charter, constitution, and by-laws of the association. No member can be expelled, and thus deprived of his share of the property of the association, unless for the violation of some provision of the law of the association creating the offense charged, and prescribing expulsion as the penalty.

ASSOCIATIONS — VOLUNTARY — EXPULSION — NOTICE OF HEARING.—No member can be expelled from a voluntary association without due notice of the charge against him, and of the trial of the charge, and an opportunity of being heard in his defense;

if no other method of notice is prescribed by the by-laws, it must be served personally.

ASSOCIATION—VOLUNTARY—EXPELLING SUBORDINATE ASSOCIATION—NOTICE OF HEARING.—The rules applicable to the expulsion of a member of a voluntary association are applicable to the expulsion of a subordinate society and its members. Hence notice of the hearing of a charge against a subordinate society must be served personally on the members, unless the constitution or by-laws of the association provide that such notice may be served on the officers of the subordinate society.

ASSOCIATIONS—EXPULSION OF SOCIETY—CITATION TO FORMER OFFICERS—JURISDICTION—DE FACTO OFFICERS.—Service of a notice of the hearing of a charge against a subordinate grove of Druids upon former officers, whose term expired eight months before, and who had abdicated their offices prior to such expiration, cannot confer jurisdiction upon the grand grove to forfeit the charter of the subordinate grove, where there were de facto officers, who had been elected the successors of those whose terms had expired, to whom no notice was given, especially where the laws of the association do not provide for vicarious service on the officers of a subordinate grove. Such a proceeding deprives the members of the subordinate grove of their property without due process of law.

ASSOCIATIONS—FORFEITURE OF CHARTER—JURISDICTION—FINDING.—Jurisdiction of the grand grove of Druids to forfeit the charter of a subordinate grove does not appear from a finding that a person appeared before the trial committee on the part of the defendants, who comprise only two members of the subordinate grove, under authority given him by only one of such members, whose authority does not appear.

APPEAL—MISTAKE IN RECORD—CORRECTION.—Where the name of a person is erroneously stated in the record, and counsel on both sides admit the error, an appellate court will not rest its decision upon such false statement, which could be readily cured by the admission of the respondent's attorney, or by amendment in the court below, or upon order to such court by the appellate court.

ASSOCIATIONS—FORFEITURE OF CHARTER OF SUBORDINATE SOCIETY—JURISDICTION.—Written charges against a subordinate grove of Druids, alleging general violation of the terms of its charter and that it had refused to obey the laws of the grand grove, and stating specific acts which do not appear to be violations of the charter or of any laws of the order, do not state an offense justifying forfeiture of the charter of the subordinate grove, and confer no jurisdiction on the grand grove over the subject matter of the proceeding.

Fitzgerald & Abbott, for the appellant.

A. B. Hunt, for the Grand Grove, respondent.

Louis F. Dunand, for the Garibaldi Grove and John H. Knarston, respondents.

¹¹⁸ SMITH, C. Appeal from judgment for plaintiff against defendant Duchein, and from order denying motion for new trial.

The plaintiff is a corporation organized under the laws of this state. The defendant, the Garibaldi Grove, was, on and before June 22, 1893, a subordinate unincorporated association, organized under charter from the plaintiff; but on that date, by a vote of the Grand Grove, at the annual session held in San Francisco for the year 1893, a resolution was passed whereby the Garibaldi Grove was declared "dissolved, and . . . the charter and all property of said Garibaldi Grove . . . forfeited to the Grand Grove," etc. At that date the defendant Duchein was the treasurer of the Garibaldi Grove, and as such had in his custody the sum of nine hundred and fifty-four dollars and fifteen cents, the property of the grove; and the suit was brought May 21, 1895, to recover judgment against him for this money.

No relief was demanded or given against the defendant association. Nor is it explained why it was desirable or how it was possible to make an association, which, according to the allegations of the complaint, had been dissolved, a party to the suit. Yet this defunct association is not only made a party, but appears as though living, and files an answer in the lower court praying for judgment in favor of the plaintiff—thus presenting the case of a deceased party coming into court to participate in a contest as to the disposition of its estate, and at the same time asking an adjudication of its own decease. The error, however, though grotesque, is immaterial, and is referred to simply for the purpose of clearing the case of an unnecessary complication. The suit is merely a suit against the defendants Duchein and Knarston, who are to be regarded as the only defendants.

¹¹⁹ The sole question in the case is as to the validity of the resolution of the Grand Grove declaring a dissolution of the Garibaldi Grove and a forfeiture of its property to itself. If that was valid the plaintiff was entitled to recover from Duchein the amount held by him as treasurer at the time of the dissolution; otherwise not.

It is indeed claimed by Duchein that between the date of the alleged dissolution and March 23, 1895, he paid out as treasurer, and under the direction of the Garibaldi Grove (for lawyers' fees and cost in previous suit—reported in *Grand Grove etc. v. Garibaldi Grove etc.*, 105 Cal. 219, 38 Pac. 947), the sum of seven hundred and eighty-one dollars, and on that date turned the balance over to his successor; and it is submitted by his counsel "that Mr. Duchein ought not to be compelled to pay these

amounts twice." But if the dissolution of the grove and the forfeiture of its property to the Grand Grove be valid, such must be the result.

The principles of law governing the decision of the question involved may be thus summarized: "There is no distinction in principle between expelling a member from a subordinate grove and revoking the charter of the grove itself": *Grand Grove etc. v. Garibaldi Grove etc.*, 105 Cal. 219, 38 Pac. 947.

Associations of this character are not bodies politic or corporations; nor are they recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name. Such associations cannot, therefore, acquire or hold property, though often said to do so. All the property said to belong to it is in fact the property of its members and each man's share of it is his own private property and equally protected by the fundamental laws: 1 Bacon on Benefit Societies, sec. 27. For the same reason such associations cannot sue or be sued. In suits where they are apparently parties, the real parties are the members of the association, who—as in the case of partnerships—are sued by the company name.

Associations of this kind are not vested with the right of expulsion by the general law of the land, but by the agreement of the members as expressed in the charter, constitution, and by-laws of the association. To these and to legislation subsequently ¹²⁰ to be enacted, every member assents in joining the association: 1 Bacon on Benefit Societies, secs. 64, 81. There thus arises a special law resting on the agreement of the members and binding on them; and in this, and not in the general law, is to be found the source of the power of expulsion. Hence it is said: "The rights of the members of these associations rest in contract, and . . . can only be divested in the manner provided in the contract": 1 Bacon on Benefit Societies, sec. 104.

It follows—unless in the case of conduct subversive of the fundamental objects of the association, with which in this case we have no concern—that no member can be expelled, and thus deprived of his share of the property of the association, unless for violation of some explicit provision of the law of the association creating the offense with which he is charged, and prescribing expulsion as the penalty: *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 314, 7 Am. St. Rep. 156, 17 Pac. 217. To justify expulsion there must, therefore, be a written charge, in the nature of an indictment or information referring, either

expressly or by implication, to the particular provision of the law violated and describing some specific act or acts as constituting the offense: *Grand Grove etc. v. Garibaldi Grove etc.*, 105 Cal. 219, 38 Pac. 947; 1 Bacon on Benefit Societies, sec. 103; Hirschl's Law of Fraternities, sec. 13, p. 13.

The party accused must also have due notice of the trial of the charge, and an opportunity of being heard in his defense: *Grand Grove etc. v. Garibaldi Grove etc.*, 105 Cal. 219, 38 Pac. 947; and "if no other method of notice is prescribed by the by-laws, it must be served personally" (1 Bacon on Benefit Societies, sec. 101)—i. e., where the proceeding is against the association—on the members, for they alone are the parties to the suit. They may, however, where the constitution or by-laws of the association so provide, be served vicariously by service on certain officers or other agents designated by them for the purpose. But service of this kind is good only by virtue of the agreement of the members as thus expressed, and would otherwise be void.

The above rules apply not only to the action of a subordinate association in expelling a member, but, a fortiori, to a superior ¹²¹ association that assumes to exercise the power of expulsion over the subordinate association or its members: 1 Bacon on Benefit Societies, secs. 104, 116, subd. 4. In either case, in a proceeding for expulsion, the society exercising the power acts in a quasi judicial character and must confine itself to the powers vested in it: *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 314, 7 Am. St. Rep. 156, 17 Pac. 217; and, as in all cases of inferior tribunals, its jurisdiction must affirmatively appear.

Applying these principles to the present case, it is manifest that the proceedings against the Garibaldi Grove were without jurisdiction, either of the subject matter, or of the parties, and were therefore wholly void.

1. The claim of jurisdiction over the person of the accused association, or rather over the persons of its members, must rest on the written acknowledgment of service of the citation, appearing in the record, signed "C. Clivio, Last Noble Arch," "J. Moresi, Last Secretary." The terms of these gentlemen had expired some eight months prior to the date of the alleged service; and even before the expiration of their terms they had ceased to attend the meetings of the grove and had avowedly withdrawn from exercising their official functions—the signing of the acknowledgment being, in fact, their first official act subsequent to their abdication of their offices. In the meanwhile, other officers had been elected by those members of the

grove who continued to hold meetings; and these officers, at the time of the alleged service, were claiming to be, and were acting as, the official representatives of the grove. Their elections, it is indeed claimed, were irregular and void. But it cannot be determined from the record whether this was so, or the contrary; and on this point the burden of proof was on the plaintiff. But however this may be, the fact is indisputable that at the time of the proceeding there was a *de facto* association, consisting of members of the grove, claiming to be the grove, and represented by its *de facto* officers. And under these circumstances it was not consistent with good faith for the Grand Grove to serve Clivio and Moresi as representatives of the Garibaldi Grove and its members, or for them to acknowledge service, and to stipulate for immediate trial, on their ¹²² behalf. For the effect of thus proceeding was to deprive the members of the grove in opposition, and claimed to be recalcitrant, of the opportunity to be heard, and thus to deprive them of their shares of the property of the association without due process of law. And such, manifestly, was the purpose of the proceeding.

But apart from these considerations, and assuming that Clivio and Moresi were the officers of the association, there was no evidence of any provision of the charter, constitution, or by-laws of the association prescribing vicarious service on them or authorizing them to accept service. Hence jurisdiction could be acquired only by personal service on the members: 1 Bacon on Benefit Societies, sec. 101; and there is no pretense of such service.

Much stress, however, is laid on the finding of the court that Mr. Lovie "appeared before [the trial] committee on the part of said defendants," and it is claimed that jurisdiction was thus acquired. But the finding refers only to the defendants in this action, and cannot be construed as referring to any other members of the association. And it also appears from the finding that the only authority exercised or claimed by Mr. Lovie was the authority given him by Duchein—whose authority does not appear.

In this connection it will be proper to refer to a controversy as to the record between the attorneys of the respective parties. It is claimed by respondent's counsel that the trial committee was appointed on the motion of Mr. Duchein; and in support of this contention there is quoted in his brief the following passage from the statement: "The next day Mr. Duchein came

into the session of the Grand Grove and urged the appointment of a new committee," etc. On the other hand, it is claimed by appellant's counsel that in the reporter's transcript of the testimony the name of "Dunand" (who appears in this case as the attorney of the defunct association) was written, and that the name of "Duchain" was inadvertently substituted for his in the statement; and in support of this claim the certificate of the court below to that effect is filed in this court. Nor is the fact disputed by the respondent's attorney, who simply claims that the defendant Duchain cannot be allowed to ¹²³impeach his own record. But the counsel is mistaken in supposing that it would be to trifle with the law, or to insult the intelligence of the court to argue the point. The method of bringing the error to the attention of the court was irregular, but the court would be unwilling to rest its decision upon an alleged fact known to it, and apparently to the counsel on both sides, to be false. Nor are the resources of the law so defective as to require it to do so. The fault in the record could readily be cured by the admission of the respondent's attorney; and the duty of making such admission was imposed upon him by the provisions of section 282 of the Code of Civil Procedure, and especially by those of subdivisions 3 and 4. Or, failing such admission, the record could be amended in the court below; and such amendment, if the fact were material, would be directed by this court.

2. With reference to the jurisdiction of the Grand Grove over the subject matter of the proceeding, the case is no better. The charges against the Garibaldi Grove, as they appear in the written accusation, are of two kinds—the one consisting of the general charge that the offending grove "had violated the terms of its charter," and "had refused to obey the directions and laws of the Grand Grove," etc.; the other, of charges of specific acts that do not appear to be violations of any of the provisions of the charter, or of the constitution or by-laws of the Grand Grove, or even to be acts of the Garibaldi Grove, as distinguished from the acts of its members. There was, therefore, no offense charged against the accused association, or at least no offense justifying forfeiture. And the findings of the trial committee are equally defective.

On both grounds, therefore, the case comes clearly under the constitutional provision that no one "shall be deprived of . . . property without due process of law": Const., art. 1, sec. 13; U. S. Const., art. 14, sec. 1.

I advise that the judgment and order denying a new trial be reversed and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

Gray, C., and Haynes, C., concurred.

¹²⁴ For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

Temple, J., Harrison, J., Garoutte, J.

Hearing in Bank denied.

ASSOCIATIONS.—SUITS BY AND AGAINST ASSOCIATIONS cannot, at the common law, be brought and maintained in the name of the association, but must be in the names of the members: See the monographic note to Phipps v. Jones, 59 Am. Dec. 711. A voluntary corporation cannot sue in a corporate capacity: See the monographic note to Otto v. Journeyman Tailors' etc. Union, 7 Am. St. Rep. 162. Where the members are numerous, however, some may maintain or defend a suit in behalf of all: See the monographic note to Kearns v. Howley, 68 Am. St. Rep. 871.

ASSOCIATIONS.—EXPULSION OF MEMBERS of voluntary associations and grounds and remedies therefor are discussed in the monographic notes to Kearns v. Howley, 68 Am. St. Rep. 856, 861; Robinson v. Templar Lodge, 59 Am. St. Rep. 198-203.

ASSOCIATIONS.—EXPULSION OF MEMBERS.—NOTICE of the charge preferred against a member of a voluntary association and an opportunity to be heard must be given before he can be expelled therefrom: See the notes to Connelly v. Masonic etc. Assn., 18 Am. St. Rep. 301; Robinson v. Templar Lodge, 59 Am. St. Rep. 202, 205.

POPE v. FARMERS' UNION AND MILLING CO.

[130 Cal. 139, 62 Pac. 384.]

WAREHOUSE RECEIPT—CONTRACT TO RETURN WHEAT—DAMAGE BY THE ELEMENTS—ACT OF GOD.—A warehouse receipt, by the terms of which a defendant promises to return the wheat stored upon the surrender of such receipt, "damage by the elements excepted," imposes an absolute liability to return the wheat, unless prevented from so doing by the act of God, "damages by the elements" being the equivalent of the phrase "act of God."

WAREHOUSE RECEIPT—DAMAGE BY THE ELEMENTS—NEGLIGENCE.—Under a contract to return wheat absolutely, damage by the elements excepted, it is no defense for a defendant to show that the wheat was destroyed without negligence upon his part, but he must show that the wheat was in fact destroyed or damaged by the elements.

ACT OF GOD—FIRE OF INCENDIARY ORIGIN.—Wheat destroyed by fire of incendiary origin is not destroyed by the act of God.

J. G. Swinnerton, for the appellant.

Woods & Levinsky and Nicol & Orr, for the respondent.

140 HENSHAW, J. Plaintiff sued to recover from defendant the value of certain wheat deposited under the terms of the following written contract:

“Stockton, Cal., July 31, 1897.

“Received of Mrs. L. C. Pope, in the Eureka warehouse, situated on Levee street, Stockton, the following described merchandise, which we agree to deliver (damage by the elements excepted) upon the surrender of this certificate and payment of charges, twenty-seven hundred seventy-six sacks wheat, weighing three hundred eighty-three thousand one hundred forty-six pounds. Rates of storage, seventy-five cents per ton for the season ending June 1, 1898. 2,776 sacks wheat weighing 383,146. Room 6. Pile No. 67. Mark: L. C. P.”

The complaint alleged a demand upon the defendant for the return of the wheat and its failure to comply therewith. The answer of defendant did not deny the existence of the contract, but pleaded that through no negligence upon its part the major portion of the wheat was destroyed by fire, and the rest of it so badly damaged as to be of small value, and offered to restore to plaintiff the damaged wheat in its possession, and the value of such portion of the damaged wheat as it had already sold. Under these pleadings a trial was had before a jury. The plaintiff rested her case without the introduction of any evidence. The evidence for the defense, which was admitted without objection by plaintiff, showed that the warehouse was destroyed by fire, and that the fire was of incendiary ¹⁴¹ origin. The court instructed the jury, generally, that plaintiff could not recover if it were not shown that defendant was negligent. Verdict passed for defendant, judgment in its favor followed the verdict, and from that judgment, and from an order denying her a new trial, plaintiff appeals.

By its written contract defendant promised absolutely to return the wheat to plaintiff upon surrender of the certificate, “damage by the elements excepted.” “Damage by the elements” is the equivalent of the phrase “act of God”: *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Chidester v. Consolidated etc. Co.*, 59 Cal. 202; *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 261, 27

Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943. As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation, namely, that defendant's liability to return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tended merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God.

The judgment and order are therefore reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

ACTS OF GOD are, in a legal sense, those acts which do not happen through human agency, as storms, lightnings, and tempests. Damages by the elements are damages by the act of God: *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115. But a loss from a great fire is not one arising from the act of God: *Chicago etc. Ry. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

ON THE LIABILITY OF WAREHOUSEMEN to the owners of property stored with them, see *Brunswick Grocery Co. v. Brunswick etc. R. R. Co.*, 106 Ga. 270, 71 Am. St. Rep. 249, 32 S. E. 92; monographic note to *Schmidt v. Blood*, 24 Am. Dec. 145-160.

CROUSE v. PETERSON.

[130 Cal. 169, 62 Pac. 475.]

ESTATES OF DECEASED PERSONS—SALE OF LAND—SUIT FOR PURCHASE PRICE.—The administrator of an estate may maintain a suit to recover the purchase price against a purchaser of land belonging to the estate which was sold at a probate sale; the special remedy given by the probate law for a resale of the property is not exclusive.

WILLS—DISCRETIONARY POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.—In order that a power of sale contained in a will shall pass to the administrator with the will annexed, it must be for an administrative purpose, and not to execute a collateral trust. A discretionary power of sale given by a

foreign will to an executor named therein does not pass to an administrator with the will annexed so as to authorize a sale of lands without authorization of the probate court, and for a purpose not administrative. And this is true, although by the law of the state of the domiciliary administration an administrator with the will annexed is given the same power to sell lands as the person named in the will as executor.

WILLS—EQUITABLE CONVERSION OF LAND INTO MONEY.—IN CALIFORNIA, the fact that both the real and personal estate of a testator is distributed as one fund raises no presumption of an equitable conversion of land into money, since both species of property descend by the same rule and the executor and the probate court have the same control over each.

WILLS—POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.—Where a direction contained in a will to sell land is imperative, but discretion is given as to the time of sale, or the terms or price, the power passes to the administrator with the will annexed.

Withington & Carter and Hahn, Belden & Hawley, for the appellant.

M. L. Ward and E. W. Peterson, for the respondent.

170 **TEMPLE, J.** Plaintiff's testator resided in Minnesota up to the time of his death, and in that state made his will January 31, 1889. He died February 3, 1899. The will was duly probated in Minnesota and afterward was proven, as provided by law in reference to foreign wills, in the superior court of San Diego county, and admitted to probate, and letters of administration with the will annexed were issued to plaintiff, who in due time qualified. Thereafter plaintiff, as such administrator, not having obtained an order of sale, entered into a contract with defendant, whereby he agreed to sell, and defendant agreed to buy, certain real estate belonging to the estate, situated in the county of San Diego. The sale was duly reported to and confirmed by the probate court of that county and the proper decrees were entered and recorded. Thereafter a deed in due form was executed and tendered to the defendant, and demand made for the balance of the purchase money, according to the contract of sale. Defendant refused to accept **171** the deed and title or to pay, and this suit is brought to recover the purchase money still unpaid.

Defendant demurred to the complaint, on the ground that it appears upon its face "that plaintiff has no authority under the provisions and terms of the will of decedent, as set forth in said complaint, to sell or convey the property, or any portion thereof, described in the complaint." This presents the only question discussed on this appeal.

The will provided for the payment of all just debts, and gave all the property of the testator, wherever situate, to the same persons and in the same proportions as his estate would descend under the laws of Minnesota, and then follows the clause material here, to wit: "I hereby nominate, as the executor of this will, George W. Yates, on condition that he make no charge for his services as such executor; and I hereby authorize my said executor to sell, convey, or lease any of my estate for such prices and upon such terms he may think best, hereby requesting that my said executor be not required to give any bonds for the performance of his duties as such executor." This constitutes the entire will.

It is averred that the statutes of Minnesota contain the following provisions: "Every person appointed administrator with the will annexed shall, before entering upon the execution of his trust, give bond to the judge of probate, in the same manner and with the same conditions as is required of an executor, and shall proceed in all things to execute the trust in like manner as an executor is required to do; and whenever, by the terms of a will, the person (or persons) therein named as executor or executrix is empowered to sell and convey real estate, an administrator with such will annexed, appointed to execute the same, shall have the same power to sell and convey real estate that the person (or persons) named therein as executor or executrix could have had in executing said will. When all the executors appointed in a will are not authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust, required and allowed by the will; and their acts shall be as valid and effectual for every purpose as if all were authorized and acted together; and administrators ¹⁷² with the will annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

The testator died seized of a large estate, consisting of real and personal property, situated in many different states and territories, to wit, Minnesota, California, Washington, Texas, territory of New Mexico, and in the republic of Mexico. There are more than one hundred devisees, living in various states of the Union, and elsewhere. Judgment for defendant was entered upon the demurrer, and plaintiff appeals.

I do not doubt that a suit of this character may be maintained, although our probate law provides a special remedy in such cases. The property might have been resold and the present purchaser held responsible if, on a second sale, enough was not realized to pay costs and the amount of the present bid. That remedy is not exclusive, and in some possible case might not be adequate. The purchaser might also have appealed from the order of the probate court confirming the sale, but did not. It is not contended here that the order of confirmation will conclude the purchaser as a judgment to which he was a party. Whether it would have any effect upon the purchaser has not been considered, and is not here determined.

Our statute provides that: "Administrators with the will annexed have the same authority over estates which executors named in the will would have, and their acts are as effectual for all purposes": Code Civ. Proc., sec. 1326. This statute was quite elaborately considered in *Kidwell v. Brummagim*, 32 Cal. 436, upon which case appellant very greatly relies. The case is very instructive, principally because no reason given for sustaining the power of the administrator in that case exists here.

The name of the executor in the *Kidwell* case does not appear in the clause or paragraph in which the power to sell is conferred upon him. "The executor of this, my last will and testament, will, within two years after my decease, sell." This circumstance has been deemed of importance, as indicating that power was conferred upon the executor as such, and not to ¹⁷³ the person by name as one in whom the testator had special confidence. In the present will the testator in one sentence says, omitting unnecessary words: "I nominate as executor of my will, George W. Yates, on condition that he make no charge for his services, and hereby authorize my said executor to sell, convey or lease any of my estate for such prices and upon such terms as he may think best, and he is not required to give bonds."

2. The power to sell in the *Kidwell* case was not a mere naked power. It was coupled with trusts. It was to raise money to pay specific legacies, practically for distribution, which is plainly a purpose within the usual scope and function of an executor. In the present case there is no executorial purpose. Clearly, it was not for the purpose of distribution, for he directs his property, wherever situated, to descend according to the laws of Minnesota; and, besides, if it was to be treated as

personalty and distributed in Minnesota, the direction to sell would have been mandatory and not left in the discretion of his executor to sell or lease.

3. And this brings us to the most obvious difference between the case in 32 California and the case in hand. There the sale was mandatory. All of his real estate was to be sold for the purpose of distribution. Here the executor is named and authorized to sell, convey, or lease, for such prices and upon such terms as he may think best, any portion of his estate. As it is the duty of all trustees to execute their trust in the manner which will best subserve the interest of their beneficiaries, plainly the executor was required to sell, or to refrain from selling, as in his judgment would be best for the estate. To some extent the executor is manager of the estate in the interest of the devisees, and a personal trust and confidence is reposed in him, and power given him beyond the usual scope and functions of executors. As a general rule, it has been held that such powers do not pass to the administrator with the will annexed. The rule as applied to statutes similar to ours is stated by Woerner (2 Woerner's American Administration, sec. 341): "They confer upon the administrator with the will annexed all powers given to the executor for the purpose of paying debts or legacies, ¹⁷⁴ or both, and especially when there is an equitable conversion of land into money for the purposes of such payment or distribution, or where the power of sale is imperative and does not grow out of a personal discretion confided to an individual; but no discretionary trust or power conferred upon an executor or for a special purpose collateral to the ordinary duties of an executor or administrator, or indicating a special confidence reposed in the individual." This proposition is sustained by numerous cases cited, and particularly by the case of *Mott v. Ackerman*, 92 N. Y. 539, where previous decisions in that state are modified and the rule stated substantially as above.

It was formerly held that as land was not testamentary assets, available for payment of debts, when power to sell any portion of it was given to the executor, even to pay debts or legacies, the will simply made the named executor trustee. He either took the property in trust to sell, or was the donee of a power in trust, and in either case could exercise the trust or sell under the power, though he did not qualify as executor. And accordingly it was held, even under a statute somewhat similar to ours, that the power did not vest in an administrator with the will annexed: *Conklin v. Egerton*, 21 Wend. 429.

In that case the matter is argued at great length and with much learning by Judge Cowen, who holds that whether land be devised to the executors to sell, or the devise is that they shall sell, the power is not in them as executors, but as trustees, and they may execute the power whether they qualify or not. Many American cases are cited to the same effect, and this was evidently the doctrine of the English courts: Sugden on Powers, 139.

This view of the matter was never tenable in this state, where real and personal property descend by the same rule, and the power of administrators and executors extends alike to both. It has not been generally adopted in other states, and has been practically reversed in New York by the case of *Mott v. Ackerman*, 92 N. Y. 539, and other cases. The trend of decision now is to construe powers vested in an executor as held *virtute officii* when it is possible to do so. Still the rule quoted from Woerner is universally recognized. The power to pass to the administrator ¹⁷⁵ *cum testamento annexo* must be for an administrative purpose, and not to execute a collateral trust.

The trouble with the plaintiff's case is, however, that the sale authorized is at the discretion of the named donee of the power to make or not, and the sale is not for an administrative purpose. We cannot presume that the sale was to pay debts. Such a presumption has been indulged in favor of creditors where real estate cannot be resorted to for payment of debts, except as provided in a will. Nor does the fact that the estate of the testator, both real and personal, is distributed as one fund raise any presumption of an equitable conversion of land into money, as was held in *Potts v. Breneman*, 182 Pa. St. 295, 37 Atl. 1002. Whatever presumption could arise in Pennsylvania from the fact that a testator bequeathed his estate as one fund, making no distinction between personal property and land, it is of no significance here, where both species of property descend by the same rule, and the executor and the probate court have the same control over each.

Appellant cites numerous cases which he contends sustain the proposition that the power will pass to the administrator even when it is discretionary. When, although the direction to sell is imperative, discretion is given as to the time of sale, or the terms, or price, undoubtedly the power passes to the administrator *cum testamento annexo*. Many cases upon this subject are cited in a note to *Giberson v. Giberson*, 43 N. J. Eq. 117, 10 Atl. 403.

Among the numerous cases cited I find none which give any color to the contention of appellant, except *Shields v. Smith*, 8 Bush, 601, and that case, when carefully examined, is of little, if any, value as an authority.

It was provided by a statute of Kentucky that in the case of the death of one of several executors the survivor "may sell the land which the will directs or devises to the executor, or to another person, to be sold, or gives discretionary power to sell," etc. By a subsequent section it was enacted, in substance, that an administrator with the will annexed shall possess all the power and authority given to the executors therein named, or any of them. The court construed this act to mean that the administrator cum testamento annexo had all the power conferred ¹⁷⁶ upon executors by the previous section. Thus explained, the Kentucky cases cannot be said to be at variance with the current of authorities upon the subject. We cannot consider the provisions of the statute of Minnesota incorporated into the will, except as to such powers as are within the usual scope of an administration of an estate by an executor; nor by such construction can we provide a trustee to execute a power given by the testator to a named person because of peculiar confidence reposed in him.

Notwithstanding the dicta in many cases, it is manifest that such statutes cannot be considered in all cases as though the language had been actually inserted by the testator in his will. Had the language been in the will it would naturally imply that the administrator with the will annexed should act as trustee of the testator even in collateral trusts. Under the rule above cited the statute has reference only to such trusts as are properly executorial.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 2d of November, 1900:

BEATTY, C. J. I dissent from the order denying a rehearing, and from the judgment.

I think it clear that under the statute of Minnesota, quoted in the opinion of the court, an administrator with the will annexed would, in that state, have had the same power of sale

that was conferred upon the executor named in the will; and I think the authorities cited in the briefs sustain the proposition that the intention of the testator is to be gathered from the terms of the will as affected by the law of his domicile. That is to say, this testator must have intended that, in case of the refusal or failure of his nominee to act as executor, or of his ceasing to act, the administrator cum testamento annexo should exercise the power of sale, and that not only in Minnesota, but wherever his property was situated.

Powers of Sale in Wills and Who may Execute Them.*

In General.—Any person may execute a power of sale, if he is capable of disposing of an estate vested in him, provided he is named as the donee of the power. This rule includes married women, and even infants, so far as a power to the latter is simply collateral: See 4 Kent's Commentaries, 324, 325. In this note, however, we shall not touch upon the capacity of particular persons to execute a power of sale when specifically named as the donee thereof. The problems relative to the execution of such powers arise when the donee or donees are dead and it becomes necessary to appoint someone to perform their duties, or when one or more donees die or refuse to serve, while others survive or qualify and are in a position to act. The problem may be even more difficult when the direction to sell contained in the will is coupled with a trust not incident to the office of an executor, or with a power indicating that the testator has reposed in the donee named a personal trust or discretion. The principal case is illustrative of one phase of the question.

Joint Powers.—Generally speaking, if a testator confers upon several persons jointly a power, all the donees must join in its execution: Marks v. Tarver, 59 Ala. 335; Wilder v. Ranney, 95 N. Y. 7; Hertell v. Van Buren, 3 Edw. Ch. 20; Boston etc. Co. v. Condit, 19 N. J. Eq. 394; Deneale v. Morgan, 5 Call, 407; Wright v. Dunn, 73 Tex. 293, 11 S. W. 330. Hence, where two of three executors attempt to make a contract of sale under a power contained in the will, the agreement is not valid. All three executors must join: Crowley v. Hicks, 72 Wis. 539, 40 N. W. 151; Noel v. Harvey, 29 Miss. 72. Even where the will designates one of the executors as having power to order a sale and to designate the particular portion of the realty to be sold, all the executors must unite in the execution of the power of sale and in giving the deed: Steves v. Weaver, 49 Hun, 267, 2 N. Y. Supp. 321. The fact that a valuable and adequate consideration has been received for the property does not make the execution of the power of sale proper and valid, if all

*REFERENCES TO MON GRAPHIC NOTES.

Execution of power of sale in will: 12 Am. Dec. 102-104.
Implied power of sale in wills: 87 Am. Dec. 209-217.

the donees did not join. A power cannot be enlarged in this manner: *Daily's Appeal*, 87 Pa. St. 487. This rule that all the donees must join in the execution does not mean that if several executors are named by a will and only one qualifies, the latter is incompetent to execute the power. This will be treated more fully under a subsequent head. It will be sufficient at this point to say that this rule at present applies only to those executors who qualify and not to those that are named in the will. Hence, if several executors are named, a sale by the one who qualifies or by the survivor is valid: *Ely v. Dix*, 118 Ill. 477, 9 N. E. 62; *Smith v. Winn*, 27 S. C. 591, 4 S. E. 240; *Noel v. Harvey*, 29 Miss. 72. A testator may require that the power of sale shall be exercised jointly by his executors and trustees, and in such case the trustees must unite with the executors, in order to render the sale valid: *Poole v. Anderson*, 80 Md. 454, 31 Atl. 207. In such a case, a deed by the executors alone will convey no title to the property: *Correll v. Lauterbach*, 14 Misc. Rep. 469, 36 N. Y. Supp. 615.

Surviving Executors.—Whether a power conferred on executors will survive to one of them may depend either on the character of the power given or on the terms by which it is given. If the power is a mere naked power of sale, unconnected with any trust, and no interest being given to the executors, there is no doubt that at common law the power would not survive to one of the executors. It must be exercised by all, or upon the death of one donee the power fails: *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513; *Wardwell v. McDowell*, 31 Ill. 364; *Peter v. Beverly*, 10 Pet. 532; *Parrott v. Edmondson*, 64 Ga. 332.

The power must, however, clearly be a naked one, devoid of interest in the executors, and not coupled with a trust. For if either of these elements coexist with the power of sale, it will survive. The quality of interest given to executors is immaterial and such interest need not be a legal one. An equitable estate is sufficient: *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513. The distinction is recognized between a devise of lands to executors to sell and a devise that executors shall sell the land: *Patton v. Crow*, 26 Ala. 426. Under the first devise, title passes to the donees, and their power of sale is consequently coupled with an interest and survives to the last remaining executor. In the latter case, no estate is given to the executors; nothing but a naked power of sale is conferred on them, and all must unite in the execution of such power; it does not survive: *Robinson v. Allison*, 74 Ala. 254.

Similarly, if the will creating the power also establishes a trust in connection with which the power is to be exercised, a joint execution is unnecessary and the power survives. The rule was stated thus in *Peter v. Beverly*, 10 Pet. 532: "When anything is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such

power survives. This becomes necessary for the purpose of effecting the object of the power": See, also, *Parrott v. Edmundson*, 64 Ga. 332; *Gutman v. Buckler*, 69 Md. 7, 13 Atl. 635. This is simply applying the ordinary rule, which governs trusts, namely, that equity will not permit a trust to be defeated merely for the lack of a trustee. The trust will not become extinct by the death of one of the trustees: *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513. So where a testator charged his lands with the payment of his debts, and by a subsequent clause in his will conferred a power of sale on his executors without further expressing the purpose of such a sale, the executors were deemed to take a power in trust which survived to one executor: *Wardwell v. McDowell*, 31 Ill. 364.

There appears to be one case in which even a naked power of sale will survive to a plural number of executors, as when a testator devises his lands to be sold by his executors, naming three of them, and one dies before a sale is made, the other two may sell. The power, in such case, is given to the executors as such, and not as individuals. The words of the will are answered, there being a plural number of executors competent to make the sale, and the testator's intent is construed to mean that those executors shall sell who are alive when the time of sale arrives: *Shelton v. Homer*, 5 Met. 462; *Muldrow v. Fox*, 2 Dana, 74.

There can be no doubt about the power of a testator to confer a joint power of sale, and to insist that only those named, or a majority of them, shall act. Hence where a power of sale was specifically given to named executors or a majority of them, a single executor had no authority to execute a conveyance: *Dodge v. Tullock*, 110 Mich. 480, 68 N. W. 239; *Carmichael v. Elmendorf*, 4 Bibb, 484. And where the power of sale was given to executors, subject to the consent of certain heirs, the power could be exercised only with their consent: *Geroe v. Winter*, 5 N. J. Eq. 655. But if the will does not show that a joint execution of the power was intended, surviving executors may act. The general rule applicable to the interpretation of wills is resorted to, namely, that the intention of the testator should be ascertained and carried out. And where the authority is given to executors as such, even a single survivor may execute. The power is given to them by reason of their holding the office of executors, and as the office survives, by parity of reasoning the authority should also survive: *Sugden on Powers*, 146; *Peter v. Beverly*, 10 Pet. 532; *Weimar v. Fath*, 43 N. J. L. 1; *Denton v. Clark*, 36 N. J. Eq. 534.

This survival to one executor of a power of sale appears to apply to naked powers as well, where the power is given to the executors as such. For in such a case the power is annexed to the office of executor, whereas, in the ordinary case of a naked power of sale, it is merely personal to the parties named. The distinction, while certainly refined, is recognized: *Colsten v. Chaudet*, 4 Bush, 666; 2 Story's Equity Jurisprudence, sec. 1062; *Chandler v. Rider*, 102

Mass. 268. There is usually nothing in a testator's will to indicate that he intended the power to lapse upon the death of one of the executors: See *McCown v. Terrell* (Tex.), 40 S. W. 54. The modern and liberal tendency is to hold that a power of sale survives to one executor where the power is given to executors: *Dick v. Harby*, 48 S. C. 516, 26 S. E. 900. Especially is this true where the power is to be used for the benefit of some third person. So where the direction was to sell to raise money for the payment of debts, the power was held to survive and might be executed by a single executor: *Fitzgerald v. Standish*, 102 Tenn. 383, 52 S. W. 294; *Dick v. Harby*, 48 S. C. 516, 26 S. E. 900; *Putnam Free School v. Fisher*, 30 Me. 523; *Mott v. Ackerman*, 92 N. Y. 539; and a power to sell and to distribute the proceeds among certain beneficiaries will survive: *Jackson v. Burtis*, 14 Johns. 391; *Franklin v. Osgood*, 14 Johns. 527; *Correll v. Lauterbach*, 12 N. Y. App. Div. 531; 42 N. Y. Supp. 143. In *Anderson v. Turner*, 3 A. K. Marsh. 131, the question arose concerning the power of a surviving executor to make a sale under a statute which recited that the executors who qualify shall undertake the execution of the will. This statute, while in its literal terms it included merely those who qualify, and did not expressly cover a case where one of the qualifying executors died, was liberally construed as applying to a surviving executor, the court saying that it was the evident intent of the legislature to make the execution of powers of sale a part of the official duty of executors; and since the office survived, it must follow that a power incident to, and forming part of, that office would survive also.

There has been some conflict of judicial opinion as to whether a discretionary power of sale given to several executors will survive to one or more of them. In *Robinson v. Allison*, 74 Ala. 254, the rule was said to be clear and indisputable that when such a power was dependent upon the judgment or discretion of the donees, the power was a special trust or confidence, and could not be exercised without the concurrence of all. Hence the power, even if given to executors as such, could not be executed by the survivor. The case cites *Woolridge v. Watkins*, 3 Bibb, 349, as supporting the rule, and the Kentucky cases are no doubt in line with this decision: See *Smith v. Moore*, 6 Dana, 417; *Clay v. Hart*, 7 Dana, 1. And where one of the executors has resigned his office, he may still unite with the remaining executors in the execution of a discretionary power of sale. The authorities are not as unanimous as *Robinson v. Allison*, 74 Ala. 254, might indicate. Indeed, the weight of authority would appear to sustain the opposite rule that even a discretionary power given to executors will survive and may be executed by less than the whole number named. Doubtless a testator may provide that a joint execution shall be essential to the proper exercise of a power of sale. And this he may do whether the power is discretionary or not. But the language of a will should be clear in order to glean such an intent from it. And

the distinction which this Alabama case and the Kentucky cases attempt to draw between a mandatory and a discretionary power seems to be neither valid nor valuable. Such a distinction rather tends to defeat the testator's intent than to further it. As was pointed out in *Taylor v. Morris*, 1 N. Y. 341, if the testator had foreseen that one of his executors would have refused to act or have died, he would have presumed that one of his executors should execute the power alone, rather than that it should fail, and such reasoning applies as well to discretionary as to mandatory powers. All of the decisions on this point have arisen under statutes similar to that of 21 Henry VIII, caption 4, which provided that the qualified and acting executor might sell where the others named in the will refused to accept and qualify. And it has been said that no authority has ever limited the operation of this act to cases of a peremptory order to sell. And neither this act nor similar acts in this country have recognized any difference between a discretionary power and one mandatory in its character: *Wardwell v. McDowell*, 31 Ill. 364; *Taylor v. Morris*, 1 N. Y. 341; *Weimar v. Fath*, 43 N. J. L. 1; *Zebach v. Smith*, 3 Binn. 69, 5 Am. Dec. 352; *Brown v. Armistead*, 6 Rand. 594.

Where a testator directs his estate to be sold for certain purposes, without declaring by whom the sale shall be made, the executors take the power of sale by implication, provided the proceeds are distributable by the executor: *Rankin v. Rankin*, 36 Ill. 293, 87 Am. Dec. 205; *Bond v. Zeigler*, 1 Ga. 324, 44 Am. Dec. 656; *Vaughan v. Farmer*, 90 N. C. 607; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Lippincott v. Lippincott*, 19 N. J. Eq. 121. The criterion for determining whether or not executors are invested with a power of sale by implication is whether or not the fund arising from the sale is distributable by them as executors. This question has been fully treated in a monographic note in 87 Am. Dec. 209, and will not be further enlarged upon here. Suffice to say that if a power of sale does vest in the executors by implication, it will survive to a single executor in the same manner as other powers of sale which are expressly given to executors: See, in addition, *Anderson v. Turner*, 3 A. K. Marsh. 131; *Jenkins v. Stouffer*, 3 Yeates, 163; *Magruder v. Peter*, 11 Gill & J. 217; *Meakings v. Cromwell*, 5 N. Y. 136.

Qualifying Executors.—We have already seen that at common law a naked power of sale could be executed only by the joint act of all the executors named. So that when one named executor refused to accept and qualify the others could not execute the will and the testator's intent failed. It was to obviate this difficulty that the act of 21 Henry VIII, caption 4, was passed, which, in substance, provided that the qualified and acting executor might execute a power of sale when the other executors named in the will refuse to take upon themselves the administration and charge of such will. This statute or its equivalent exists in probably all

of the states of this country, and under it the executor who qualifies and acts may execute a power of sale conferred upon the executors named in the will. The authorities are numerous which support this rule: See *Corlies v. Little*, 14 N. J. L. 373; *Taylor v. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605; *Denton v. Clark*, 36 N. J. Eq. 534; *Weimar v. Fath*, 43 N. J. L. 1; *Phillips v. Stewart*, 59 Mo. 491; *Smith v. Winn*, 27 S. C. 591, 4 S. E. 240; *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 329; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305; *Chanet v. Villeponteaux*, 3 McCord, 29; *De Saussure v. Lyons*, 9 S. C. 492; *Jackson v. Ferris*, 15 Johns. 346. A qualifying and acting executor may execute the power, whether such power is a mere naked one, or coupled with a trust, or whether it is of a discretionary or mandatory character: *Wardwell v. McDowell*, 31 Ill. 364; *Ely v. Dix*, 118 Ill. 477, 9 N. E. 62. These cases bring up the question whether one qualifying executor can execute the power if it is discretionary, or whether mandatory powers only are embraced by the statute of 21 Henry VIII, caption 4. As we have already seen under a previous heading, the weight of authority holds that both mandatory and discretionary powers may be executed by the acting executor. At this point we shall merely add a suggestion of the court in *Wardwell v. McDowell*, 31 Ill. 364, to the effect that "the testator must be presumed to have known that it was possible some one of the persons named as his executors might refuse to accept the trust, and that the law provided that, in that event, those who did accept and qualify could execute the will, and it is to be presumed the testator had equal confidence in each one of the executors."

The statutes of the various states must be examined in order to determine accurately who may execute a power of sale when all the executors do not qualify. Thus, under a statute giving to the majority of the executors qualifying power to convey lands in certain cases, one of two qualifying executors cannot execute the power: *Carroll v. Stewart*, 4 Rich. 200. The circumstances under which qualifying executors may act vary slightly in different states. For example, in Illinois where the statute of 21 Henry VIII, caption 4, was in effect, one of several executors could exercise a power of sale only when it was shown that the others refused to act, and such refusal was required to be shown positively and affirmatively; a mere failure to act was insufficient: *Clinefelter v. Ayers*, 16 Ill. 329. On the other hand, the New York statute provides that mere neglect to act will authorize those qualifying to make a sale, and this neglect may be shown by any proper evidence. A writing is unnecessary, and the neglect to act may be shown, though there was no renunciation: *Roseboom v. Mosher*, 2 Denio, 61. In *Robertson v. Gaines*, 2 Humph. 367, the mere fact of failing to qualify was held to be prima facie evidence of a refusal to accept the trust, and the other executors who did qualify were competent to execute the power of sale conferred by the will. In Pennsylvania, it seems that

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not only must the named executors renounce the trust imposed upon them, but such renunciation must be of record, otherwise all the executors named in the will must join in a conveyance of realty: *Neel v. Beach*, 92 Pa. St. 221. Aside from these minor differences relative to the method of establishing the necessary fact that some of the executors named by a will have renounced their trust, the rule is apparently universally recognized that a power of sale conferred upon several executors by a will may be executed by those who accept the trust and qualify, even though only one should qualify: See, further, *Stewart v. Mathews*, 19 Fla. 752; *Niles v. Stevens*, 4 Denio, 399; *Zebach v. Smith*, 3 Binn. 69, 5 Am. Dec. 352; *Geddy v. Butler*, 3 Munf. 345; *Johnson v. Bowden*, 43 Tex. 670; *Taylor v. Adams*, 2 Serg. & R. 534, 7 Am. Dec. 665; *Warden v. Richards*, 11 Gray, 277. But all those who qualify must unite in the execution of the power. Neither a majority nor a single executor has, under such circumstances, authority to make a conveyance: *Tarlton v. Gilsey* (N. J.), 37 Atl. 467; *Johnston v. Thompson*, 5 Call, 248; *Deneale v. Morgan*, 5 Call, 407; *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66; *Littleton v. Addington*, 59 Mo. 275; *Clinefelter v. Ayers*, 16 Ill. 329; *Wells v. Lewis*, 4 Met. (Ky.) 269. A sale by two of three executors who qualify is valid neither at law nor in equity: *McRae v. Farrow*, 4 Hen. & M. 444; *Hart v. Rust*, 46 Tex. 556. All the executors who prove the will must join in the execution of the power of sale: *Wasson v. King*, 2 Dev. & B. 262.

Administrator With Will Annexed—Common-law Rule.—It has been said, and with much justice, that the American cases on the execution of powers of sale contained in wills are conflicting and not reducible to any general system. This conflict is more noticeable with reference to the exercise of such powers by administrators with the will annexed than elsewhere. However, if we start with the common-law rule upon the subject, it may be possible to find some general classification by means of which the decisions can be harmonized to some extent, so that they will be found to differ more in matters of detail than in principle. There can be no doubt that at common law an administrator with the will annexed could not execute a power of sale conferred by a will upon an executor named therein. It must be borne in mind that an executor, by virtue of his office, had no power over the testator's real estate. His administration on the estate of the decedent was confined to the personal property. As to the realty, it descended directly to the heir at law. The testator could by his will confer upon him power to sell the realty, but when he acted under such a power he was not acting by virtue of his office, but as the donee of a power conferred upon him by the will. In such a case, an executor acted in two distinct capacities—he was administering the personal estate by virtue of the legal office of executor which he held, and he also acted as a trustee under a power of sale conferred upon him by the will. This dual relation which the executor held is the key to the whole

situation, and by grasping its import, the decisions will not appear to be so irreconcilable as they would otherwise. The court observed in *Conklin v. Egerton*, 21 Wend. 430, that the differences which have arisen in the cases arise wholly from confounding the two characters in which the executor acts, that of the holder of the legal office of executor and that of the donee of a trust power. When executors are named in a will as the donees of a power of sale, they are trustees as well as executors, and it is in the character of trustees that they make a sale of the testator's land. Having no power over the testator's lands by virtue of his office and not taking the power of sale in that capacity, the power does not survive to an administrator with the will annexed. Hence, at common law, an administrator could not execute a power of sale conferred on the executors by the will: See *Compton v. McMahan*, 19 Mo. App. 494; *Moody v. Vandyke*, 4 Binn. 31, 5 Am. Dec. 385; *Moody v. Fulmer*, 3 Grant Cas. 17. In this last case it was said that the administrator with the will annexed could not sell, because the testator had placed no confidence in him. In *Compton v. McMahan*, 19 Mo. App. 494, it was pointed out that ordinarily the distinction between an executor's duties as such and those which he performed under authority from the will need not be kept in view, but in cases of this character the distinction is of special importance. As holding that an administrator with the will annexed cannot, by virtue of his office, execute a power of sale given to an executor, see *Ferebee v. Procter*, 2 Dev. & B. 439; *McDonald v. King*, 1 N. J. L. (*431), 494; *Hodgin v. Toole*, 70 Iowa, 21, 59 Am. Rep. 435, 30 N. W. 1; *Lucas v. Price*, 4 Ala. 679; *Wills v. Cowper*, 2 Ohio, 124; *Tainter v. Clark*, 13 Met. 220; *Posey v. Conaway*, 10 Ala. 811; *Brown v. Hobson*, 3 A. K. Marsh. 380, 13 Am. Dec. 187. It has been noted in many of the cases that an executor derives his powers from the will, while an administrator with the will annexed derives his powers solely from the law and not the will; hence an administrator is not authorized to execute trusts charged by the will upon the executor named therein. The law gives the administrator no power over the realty, and since his power is derived solely from that source, he has no authority to execute a power of sale conferred by the will upon an executor: *Compton v. McMahan*, 19 Mo. App. 494; *Vardeman v. Ross*, 36 Tex. 111; *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313. The Illinois courts follow this doctrine to its logical conclusion and apparently hold that an administrator with the will annexed never has authority to execute a power of sale of land given by a will to an executor, except, as we shall see, in limited cases, since the office of executor or administrator as such carries with it no authority over the real estate of a decedent: *Nicoll v. Scott*, 99 Ill. 529; *Hall v. Irwin*, 7 Ill. 176; *Penn v. Fogler*, 77 Ill. App. 365. These cases fully recognize the distinction we have pointed out, the court, in *Nicoll v. Scott*, 99 Ill. 529, saying that "executors may act in a double capacity—as executors, by virtue of their office, and as

agents or trustees under a warrant of attorney, in which latter capacity, as in the case of a power given to sell land, if they act the trust imposed upon them is of a special and confidential character, and cannot be delegated, and that it is only the powers and duties of the executor, as such, resulting from the nature of his office, which devolve upon an administrator with the will annexed, and not an authority as trustee—a power to sell land—which is a personal trust or confidence reposed in the executor by the testator.”

Administrator With Will Annexed—Statutory Modifications.—It is solely by virtue of statutory changes that an administrator with the will annexed has under any circumstances been permitted to execute a power of sale of land conferred upon executors. The obvious difficulties and inconveniences which flowed from the holding that an administrator with the will annexed could not execute a power of sale given to the executors has, in most of the states, resulted in legislative enactments of one sort or another aimed directly at this rule and seeking to obviate its effect. Thus in Mississippi a statute provided specifically that if the executor failed to qualify or died before he executed the will, the administrator with the will annexed should sell the land under a power conferred by the will. Clearly, under such an act the power of sale would survive: *Sandifer v. Grantham*, 62 Miss. 412; *King v. Talbert*, 36 Miss. 367. But where the statute provided that if a power of sale be given to several executors or other persons, if one or more of them die before its execution, the authority would survive, an administrator with the will annexed is not within the purview of the act and could not execute a conveyance: *Chandler v. Delaplaine*, 4 Del. Ch. 503. And an act providing that when any particular directions are given by a testator in his will respecting the sale of property, the same shall be followed, will not empower an administrator with the will annexed to sell the testator's lands: *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313. In Missouri prior to the revision of the laws in 1879, a statute provided that an administrator with the will annexed might sell under a power in the will, if no one was appointed by the will for that purpose, “or if such person fail or refuse to perform the trust.” In the revision of 1879, through some inadvertence, the above-quoted words were omitted, and the court was required to hold that this restored the common-law rule, and an administrator with the will annexed had no authority to execute a power of sale conferred by the will, unless the will failed to name a donee: *Compton v. McMahan*, 19 Mo. App. 494.

Of course, if the language of the will permits such a construction, an administrator may execute a power in the will if he was contemplated by the testator as a possible donee of such power. A statute is not required to give him such authority if the testator has already conferred it by his will. Hence, where a will recited that in case the executrix named failed or refused to accept the office and qualify, “then proper authority shall appoint some suitable person to exe-

cute" the will and the powers contained therein, an administrator with the will annexed was within the contemplation of the testator and might execute a power of sale: *Curran v. Ruth*, 4 Del. Ch. 27. Similarly, if a will expressly authorizes a sale of land to be made by any person legally qualified to administer the estate, an administrator with the will annexed may act: *Rollins v. Rice*, 59 N. H. 493. And where such an administrator has authority to act, he may do so without license from the probate court: *Rollins v. Rice*, 59 N. H. 493. And he is not amenable to the supervisory jurisdiction of the probate court: *In re Settlement of Rickenbaugh*, 42 Mo. App. 328. Though this rule will not prevent his being subject to the probate court if a statute so provides. Even should the will give power to sell without any order of court, or without being required to account to any court after the sale, a statute may restrict the exercise of such a power, and may place limitations upon the authority that may be conferred upon an executor: *Bennalack v. Richards*, 116 Cal. 405, 48 Pac. 622.

In most of the cases where the question has arisen as to the authority of an administrator with the will annexed to sell a testator's realty, it has arisen under a statute purporting to give an administrator power to act. In some of the states there seems to be little, if any, difference between the powers of executors and administrators over estates of decedents, and here an administrator's right to sell under a power would appear to be unrestricted: *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468; *Green v. Davidson*, 4 Baxt. 488. By the great weight of authority, however, the power of an administrator with the will annexed, as we shall see, is very materially restricted, even under statutes purporting to confer upon them the same powers as executors. However, under an ordinary power of sale contained in a will, an administrator may act by virtue of legislative enactments, which are common: See *Evans v. Blackiston*, 66 Mo. 437; *Dilworth v. Rice*, 48 Mo. 124; *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032; *Keefer v. Schwartz*, 47 Pa. St. 503; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371; *Steele v. Moxley*, 9 Dana, 137; *Shields v. Smith*, 8 Bush, 601; *Mosby v. Mosby*, 9 Gratt. 584.

We have seen that where a power of sale is given by a will, but no one is named to execute such power, it will devolve upon the executors by implication. In a similar situation, when an administrator with the will annexed is appointed, it is clear that at common law such administrator would not become the repository of this power. An administrator never succeeded to any powers except those conferred by the law and which devolved upon the office of executor as such. Among these powers was included no authority relative to the real estate of the testator. Hence it necessarily followed that an administrator could not execute a power of sale conferred by the will where no donee was named: *Hall v. Irwin*, 7 Ill. 176; *Tainter v. Clark*, 13 Met. 220, 228; *Hester v. Hester*, 2 Ired. Eq. 330. This may be changed by statute, without doubt, as is fre-

quently the case: *Compton v. McMahan*, 19 Mo. App. 494; *Smith v. McCrary*, 3 Ired. Eq. 204. Under a statute authorizing an administrator to sell when all the executors die or refuse to act, an administrator was permitted to sell where no executors were appointed. The situation did not come within the letter of the statute, but it was within its spirit, and being a remedial act the court gave it a most liberal interpretation and held such a case to be embraced within its purview: *Hester v. Hester*, 2 Ired. Eq. 330. In some of the cases it is difficult to determine upon what precise theory the court sustained the action of an administrator with the will annexed where no donee of the power of sale was named in the will. Thus in *Putnam v. Story*, 132 Mass. 205, where such a situation existed, the court said that the administrator, by virtue of his office, took the power to sell the real estate. It does not appear whether there was any statute under which the administrator would take a power of sale conferred by the will. If no such statute existed, the case must be sustained upon the theory that the direction to sell operated as a conversion of the real estate into personalty, and the administrator, having authority over the personal estate by virtue of his office, took authority over the real estate for the purposes of the will, such real estate being impressed with the character of personalty by reason of the direction to sell.

Where a Power of Sale is Given, Especially to the Donees Named in the Will, there is little doubt that an administrator with the will annexed will have no authority to execute such power. This is oftentimes a difficult matter to determine. Certainly, a naked power would not at common law survive to an administrator: *Moody v. Vandyke*, 4 Binn. 31, 5 Am. Dec. 385. And if the power is given to an executor as a personal trust, indicating a special confidence reposed in him alone, the authority to execute it will not survive to the administrator with the will annexed: *Greenough v. Welles*, 10 Cush. 571. The authorities, however, are not entirely harmonious upon this point, though the weight of authority clearly supports the rule as stated. This conflict is due, to some extent, to the different wordings of the statutory enactments which purport to confer upon administrators with the will annexed full power over the execution of the testator's will. A testator, no doubt, may by his will confer powers upon an executor relative to the management of his estate, and he may limit the exercise of those powers to the particular individual named. It is in view of such rights on the part of the testator that courts are disposed to say that a purely discretionary power of sale conferred upon a named executor must be executed by him and cannot survive to an administrator with the will annexed. Thus in New York it is deemed settled that such an administrator cannot execute a discretionary power of sale vested in executors. He can succeed to such a power only when it is imperative: *Cooke v. Platt*, 98 N. Y. 35; *Greenland v. Waddell*, 116 N.

Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367. The rule was well expressed by Judge Finch in *Mott v. Ackerman*, 92 N. Y. 539: "Where the power granted or the duty involved implies a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case, the power and duty are not those of executors, *virtute officii*, and do not pass to the administrator with the will annexed." It will be seen that this is not a literal interpretation of the statute conferring upon administrators with the will annexed power to execute the will. The statute reads that such administrators "shall have the same rights and powers and be subject to the same duties as if they had been named executors in such will": 2 N. Y. Rev. Stats., sec. 22, p. 72. A liberal construction of this act would have empowered administrators to execute discretionary powers of sale, but the courts have held otherwise, and strictly construed an act which changed the common law, in harmony with the well-recognized rule of construction. Under the Alabama statute it is clear that discretionary powers of sale were never intended to survive to administrators with the will annexed. The act itself limits its application to naked powers of sale and to specific devises of lands to executors to sell. Hence, where there is a direction to sell, and the power shows that it is founded in the personal confidence reposed by the testator in the executor, such power is not transmitted to another, and an administrator has no authority to act: *Mitchell v. Spence*, 62 Ala. 450; *Anderson v. McGowan*, 42 Ala. 280. Some of the cases fail to indicate clearly whether a distinction is drawn between a discretionary power of sale where the proceeds are to be used in the performance of purely executorial duties, and a discretionary power where no such use of the proceeds of the sale is directed. For example, in *Bennett v. Chapin*, 77 Mich. 526, 43 N. W. 893, the power of sale was given "if the executors shall at any time find it necessary, or shall deem it for the best interest of my estate," obviously a power implying personal confidence and trust, which the court held, and also that an administrator with the will annexed could not execute the power. The power in this case did not relate to the ordinary duties which attach to the office of executor, and the court clearly and correctly held that an administrator with the will annexed cannot execute powers and duties which lie outside the ordinary scope of an executor's functions. But it is not clear from the opinion whether the administrator would have had power to act notwithstanding the discretionary character of the direction, if the proceeds of the sale were to have been devoted to a purpose falling strictly within the duties of an executor. In New York it would appear from the cases already considered that a discretion given to executors will prevent an administrator with the will annexed from acting, whether the power concerned the duties of an executor or not. But even here a limited discretion may be conferred which will not render the power itself any the

less imperative, and where such is the case an administrator with the will annexed may act. Thus in *Carpenter v. Bonner*, 26 N. Y. App. Div. 462, 50 N. Y. Supp. 298, a testator directed his executors to sell and convert all his real estate into personalty. The words "at their discretion" were also used, but from the context of the will it was clear that such words related merely to the time at which and the circumstances under which a sale might be made. The court held that this was not such a personal discretion as prevented the administrator from acting, and that the direction to sell was imperative. *Clifford v. Morrell*, 22 N. Y. App. Div. 470, 48 N. Y. Supp. 83, is a somewhat similar case in which a like ruling was made. The discretion, it seems, then, must be a personal one involving the question whether there shall be a sale at all or not, in order to deprive the administrator of the power of acting. In *Dilworth v. Rice*, 48 Mo. 124, the testator imposed a discretion on his executors as to the time at which and the terms upon which his land should be sold, but in other respects the will absolutely directed a sale, and the court held that no confidence or trust was reposed, especially in the executors named, and that the power of sale survived to an administrator with the will annexed. This case seems to draw no distinction between the survival of a discretionary power to one executor named in the will and the survival of a similar power to an administrator with the will annexed. There is, however, a radical difference between the two cases. In the case of a surviving executor, the testator has already indicated that he reposed in him a special confidence, since he is named as one of the executors, and the testator exercised as great care in his selection as in the choice of the other executors. But of the administrator this cannot be said. He is an unknown person, so far as his selection by the testator is concerned, and the testator might not have been willing to clothe him with a discretion as to the disposal of his real estate. So that it is reasonable to suppose the testator intended a discretionary power of sale to survive to an executor he might name, where no such intent can be gathered where the executors are dead or refuse to act, and an administrator with the will annexed is appointed. And the cases act upon this distinction if they sometimes fail to define it clearly. We have seen that the weight of authority favors the rule that a discretionary power of sale to several executors survives to one. On the other hand, the cases we are now considering clearly indicate the weight of authority to be against the doctrine that an administrator with the will annexed can execute a discretionary power conferred upon executors. As sustaining this rule, see *Naundorf v. Schumann*, 41 N. J. Eq. 14, 2 Atl. 609; *Brown v. Hobson*, 3 A. K. Marsh. 380, 13 Am. Dec. 187; *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Hinson v. Williamson*, 74 Ala. 180; *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392; *Bigelow v. Cady*, 171 Ill. 229, 63 Am. St. Rep. 230, 48 N. E. 974; *Pratt v. Stewart*, 49 Conn. 339; *Simmons v. Taylor*, 19 N. Y. App.

Div. 499; 46 N. Y. Supp. 730; *King v. Talbert*, 36 Miss. 367; *Stoutenburgh v. Moore*, 37 N. J. Eq. 63. *Simmons v. Taylor*, 19 N. Y. App. Div. 499, 46 N. Y. Supp. 730, concisely states the rule thus: "Whatever the executor must do under the will the administrator may do. Whatever else the executor may or may not do under the will according to his discretion, or as his personal interests may be affected, the administrator cannot do." The greatest care must be exercised in determining whether a real discretion is reposed in the executors or not, and right here lies the great difficulty and is found the reason for much of the apparent conflict in the cases.

The rule itself is easy to comprehend, but its application is frequently attended with difficulty. The mere fact that a trust power is conferred upon executors is no indication that some personal confidence distinct from that ordinarily reposed in executors is given: *Mott v. Ackerman*, 92 N. Y. 539. A direction that the sale should be made "by my executrix" is not a personal authority, but is annexed to the office and will survive to an administrator with the will annexed: *Bailey v. Brown*, 9 R. I. 79. A power of sale to "my executor, hereinafter named," is not a personal power, and an administrator may act: *Green v. Russell*, 103 Mich. 638, 61 N. W. 885. We have already noticed that a peremptory direction to sell, coupled with a discretion as to the time, place, and terms of sale, is not such a personal trust as will not survive to an administrator. In such a case the peremptory direction will control. See further on this point, *Evans v. Blackiston*, 66 Mo. 437; *Brown v. Armistead*, 6 Rand. 594. In this last case the direction was for the executors to sell, "provided the said land will sell for as much as, in their judgment, will be equal to its value." Yet this was deemed to furnish no obstacle to the administrator's making a sale after the executors had renounced their trust. In *Giberson v. Giberson*, 43 N. J. Eq. 116, 10 Atl. 403, a direction to sell "at such times and in such manner as they shall think most advisable" was held to vest no personal discretion in the executors, and an administrator with the will annexed could execute the power. A very sensible ruling was made in *Drummond v. Jones*, 44 N. J. Eq. 53, 13 Atl. 611, when the court held that if the power of sale is annexed to the office of executor, and it is created to enable an executor to perform his duties, although the words creating the power indicate that the donee may exercise discretion, yet it will be held to belong to the office, and may be exercised by any person who may happen to fill the office. This would be an answer to some extent to the query suggested earlier in this note, as to whether a discretionary power of sale relating to duties which ordinarily attach to the office of executor will survive to an administrator with the will annexed. Under the principle of this case such a power would survive, unless it is perfectly clear from the language that a purely personal discretion is lodged in the executors named. This we believe should be the criterion in such cases in determining whether a power would sur-

vive to an administrator where some language is used indicative of a discretion reposed in the donee. Yet it must be admitted that the cases do not clearly enunciate such a rule. They are uncertain here as well as on other points relative to the survival of powers. In *Potts v. Breneman*, 182 Pa. St. 295, 37 Atl. 1002, it seems to be admitted that a power of sale given to an executor by virtue of his office survives to an administrator, whether the power is discretionary or otherwise. To the same effect, see *Tarrance v. Reuther*, 185 Pa. St. 279, 39 Atl. 956, where the power to sell "either at public or private sale, whenever and however it may be thought best," was held to confer a discretion which was not limited to the donee named, but was conferred upon the office of executor as such. In a few of the states even a discretionary power of sale is held to survive to an administrator by virtue of statute; See *Gulley v. Prather*, 7 Bush, 167; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. 371. Thus in *Shields v. Smith*, 8 Bush, 601, under a statute which enacted that "an administrator with the will annexed shall possess and execute all the power and authority, and shall have the same right and interest, and be responsible in like manner to the executors named therein, or any of them," it was held that an administrator could execute the powers created by a will, notwithstanding a special trust was reposed by the testator in the particular persons named as his executors. This, however, is not the prevailing rule, even under statutes purporting to confer large powers upon administrators. The statute of North Carolina gives to an administrator all the rights and powers conferred on the executor by the will, and the courts of that state hold that the decisions of other jurisdictions restricting the powers which will devolve upon an administrator with the will annexed are not applicable, such an administrator being vested with as full power as if he had been named as executor by the will; *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032. As we shall hereafter see, the fact that a discretion is conferred upon an executor so that an administrator is prohibited from executing the power, does not always mean that the power fails. Especially if the power involves a trust, the courts will see that the trust does not fail merely for the want of a trustee.

It is hardly necessary to add that a peremptory power of sale will survive to an administrator with the will annexed, where a power of sale of real estate is allowed to survive to an administrator under any circumstances: See *Rutherford v. Clark*, 4 Bush, 27; *Clark v. Denton*, 36 N. J. Eq. 419; *Mott v. Ackerman*, 92 N. Y. 539; *Clifford v. Morrell*, 22 N. Y. App. Div. 470; 48 N. Y. Supp. 83; *Dilworth v. Rice*, 48 Mo. 124; *Venable v. Mercantile Trust etc. Co.*, 74 Md. 187, 21 Atl. 704.

Power Attached to Office.—The chief test as to whether a power conferred by a will upon an executor named therein will survive to an administrator with the will annexed is whether such power is given to him in his capacity as executor, involving duties which

are distinctively executorial in their character, or whether the power is conferred upon the donee in a capacity different from his duties as executor, so that as to such duties he is not regarded as an executor but as something else, either a trustee or a mere donee. An administrator with the will annexed will succeed to the duties and powers of the executor which result from the nature of his office as executor, but he will not succeed to a power where the duties to be performed are distinctively different from those of an executor: See *Mott v. Ackerman*, 92 N. Y. 539; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192; *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367; *Harrison v. Henderson*, 7 Helsk. 315; *Armstrong v. Park*, 9 Humph. 194; *Lantz v. Boyer*, 81 Pa. St. 325; *Venable v. Mercantile Trust etc. Co.*, 74 Md. 187, 21 Atl. 704. Upon this single point the courts are quite harmonious, most of them holding that to allow an administrator with the will annexed to succeed to a power of sale conferred upon the executors named in a will, the duties to be performed must be those which belong to the office of executor as such. The conflict arises in ascertaining what are the distinctive duties of an executor as such. Now an executor at common law had no authority whatever over the real estate of his testator. The powers incident to his office were solely connected with the personal estate. Hence, in the absence of any special power conferred upon him by the will, an executor's duties as such were confined to the administration of the personal property. A simple power of sale of realty had no relation to his ordinary duties as executor, and such a power he took in a capacity different from that in which he acted in administering the estate. He acted either as the simple donee of a power or as a trustee to perform certain duties imposed upon him by the will. While an executor had no authority at common law to deal with the real estate of the testator, he was authorized by virtue of his office to pay debts and legacies. Hence it would seem that a power to sell real estate for the purpose of paying debts and legacies was a power given to the executor by reason of his holding such office, and was a power incident to and connected with such office, and not a power which involved duties different from those which an executor was authorized to perform by virtue of his office. Accordingly, we find that it is held that a power to sell to pay debts and legacies is a power belonging to the office of executor and will survive to an administrator with the will annexed. This is certainly true where a testator's real property is ever subject to a liability for debts and legacies. Thus in New York, under a statute authorizing an administrator to perform all the duties and powers given to an executor by a will, the rule was stated, "that where a power of sale was given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is

imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and, under the statute, passes to and may be exercised by the administrator with the will annexed": *Mott v. Ackerman*, 92 N. Y. 539. This is undoubtedly the generally prevailing rule, that so far as a direction to sell for the payment of debts and legacies is concerned, such duties being incident to the office of executor, the power survives to an administrator with the will annexed: *People v. Huffman*, 182 Ill. 390, 55 N. E. 981; *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473, 4 N. E. 606; *Harrison v. Henderson*, 7 Heisk. 315; *Caruthers v. Caruthers*, 2 Lea, 264; *Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W. 1031; *Green v. Russell*, 103 Mich. 638, 61 N. W. 885; *Lantz v. Boyer*, 81 Pa. St. 325; *Venable v. Mercantile Trust etc. Co.*, 74 Md. 187, 21 Atl. 704.

There seems to have been some doubt as to whether, after a devise of real estate to certain persons, a direction to sell for the purpose of converting the real estate into money so as to make it more convenient to partition among the devisees, imposed a duty upon the executor by virtue of his office which an administrator could execute. An executor as such had no authority over devises of real estate at common law. Such property vested in the devisees without any act on the part of the executor. This would appear to be the basis of some of the early holdings that a power to sell land to turn it into money for convenience of partition was not a power incident to the office of executor, but collateral to it, and hence an administrator with the will annexed could not perform such duties: See *Waters v. Margerum*, 60 Pa. St. 39. Such decisions were, in part at least, due to the statutes under which they were decided which empowered administrators to execute a power for the sale of land for the one purpose of paying debts. The decisions, therefore, were unduly strict in requiring the purpose to be purely administrative in order to authorize an administrator to sell under a power conferred by the will. As was expressed by Gibson, C. J., in *Ross v. Barclay*, 18 Pa. St. 179, 55 Am. Dec. 616, the administrator with the will annexed "may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; for instance, to manage the property and invest the proceeds for accumulation; or to maintain the widow and children; or to turn the land into money for the convenience of partition; or to exercise any discretionary power confided to his predecessor in the administration for his personal fitness and fidelity." But it should be observed in both of these Pennsylvania cases cited above that above and beyond the direction to sell for convenience in partition there were trusts created for the purpose of investment, so that the cases can hardly be considered authority for the bare doctrine that a direction to sell for purposes of distribution among the devisees is a power involving duties not incident to the office of

executor and for this reason would not survive to an administrator with the will annexed. If these cases, however, could be deemed authorities for this rule, they have been overruled by later decisions, and the rule in Pennsylvania now is that an administrator will succeed to a power to sell for the purposes of distribution: *Tarrance v. Renther*, 185 Pa. St. 279, 39 Atl. 956; *Potts v. Breneman*, 182 Pa. St. 295, 37 Atl. 1002. We see no difficulty in holding that a direction to sell for the purpose of distribution is a duty distinctively executorial which will survive to an administrator, and for this reason the direction to sell and distribute operates as a conversion of the realty into money from the death of the testator, and the money being personal property over which the executor had control by virtue of his office for the purposes of distribution, the duty respecting it devolved upon an administrator as the successor to the office. This doctrine of conversion is recognized and has been applied in similar cases: *Potts v. Breneman*, 182 Pa. St. 295, 37 Atl. 1002; *Evans v. Chew*, 71 Pa. St. 47; *Lantz v. Boyer*, 81 Pa. St. 325. In the last two cases cited it was clearly held that a power to sell for the purpose of distributing the proceeds among persons named in the will belongs to the executor *virtute officii*, whether the direction is absolute or a mere discretionary power, or whether the distribution is to be immediate or upon the expiration of a certain time.

The powers of executors as such have been greatly enlarged in modern times in most of the American states, and this enlargement has consisted in extending their powers over the realty of decedents. Their powers being thus extended and being attached to their office as such, an administrator with the will annexed will necessarily succeed to more powers than he would at common law. This lessens the difficulty of distinguishing between powers which are annexed to the office of executor and those which are not. And at the same time the statutes of each state must be examined in order to ascertain whether a power conferred by a will upon an executor is taken by such executor in his official capacity, or whether it involves something outside of his ordinary duties. Without ascertaining this, one cannot determine whether a decision in one state is in point elsewhere or not. These statutory changes have rendered less important than formerly the distinction between purely executorial duties and those which are not. Under the common law an executor had no authority over real estate; hence a power conferred by the will would not ordinarily survive to an administrator with the will annexed. In many of the states an executor is given large powers over a decedent's real estate, and hence a power conferred by the will over such property will survive to an administrator with the will annexed, if within the scope of the duties which appertain to the executor's office within the meaning of the statute.

For example, in California both real and personal property descend in the same manner, and an executor is given possession of

both for the purposes of administration. Hence, as illustrated by the principal case, a direction to sell realty to raise money for the purpose of distribution is a purpose plainly within the scope and function of an executor, and will, therefore, survive to an administrator: See, also, *Kidwell v. Brummagim*, 32 Cal. 436. In Indiana, an administrator seems capable of performing all the duties which may be given to an executor by a will, except, perhaps, those involving personal trust and confidence: *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468. Where an executor is by statute given possession and control of the real and personal estate of the testator for all purposes of administration, including the payment of debts and legacies and the distribution of the property, there is no difficulty in holding that a power to sell real estate to distribute the proceeds, or for the convenience of partition, may be properly executed by an administrator with the will annexed. The difficulty arises where the duties of an executor have not been extended so as to give full power over real estate. Thus in Illinois, an executor is given power over real estate only when it becomes necessary to sell it for the purpose of paying debts or legacies: *People v. Huffman*, 182 Ill. 390, 55 N. E. 981. Full power over real estate is not conferred as an incident to the office of executor. Under this statute the question arose whether a devise of land to children, with the direction that it should be sold at a certain time and the proceeds divided among the surviving children, could be executed by an administrator. The court held, in *Nicoll v. Scott*, 99 Ill. 529, that the power to sell land as directed did not belong to the office of executor, and therefore an administrator would not succeed to such power. It will be noticed that the power was not a direction to sell for the purpose of paying debts and legacies. Instead, there was a devise to certain beneficiaries of the land, with a direction to sell and distribute the proceeds, apparently for the convenience of partition. The decision was probably correct in view of the Illinois statutes. But if the direction had been to sell the land and distribute proceeds among named beneficiaries, we do not see why such a power could not have been executed by an administrator with the will annexed. Because the direction to sell in such a case would operate as a conversion of the real estate into personal property over which the executor had control by virtue of his office. The doctrine of equitable conversion is recognized in Illinois: *Matter of Corrington*, 124 Ill. 363, 16 N. E. 252. In *Conklin v. Egerton*, 21 Wend. 430, it was held that a power to an executor to sell real estate and to divide the proceeds among devisees to whom the estate had been given by a previous clause of the will cannot, after the executor's death, be executed by an administrator with the will annexed. In this case if the direction had been to sell for the purpose of paying debts and legacies, there would appear to have been no obstacle in the way of an administrator succeeding to such powers, since they are by the law of New York annexed to the office of executor. Later decisions

have fully settled this. Even as applied to devises of land and a power of sale to divide among the devisees for the convenience of partition, it may be doubted whether *Conklin v. Egerton*, 21 Wend. 430, is a correct statement of the law as it exists in New York to-day. The case seems in effect to have been overruled by *Mott v. Ackerman*, 92 N. Y. 539, and later cases. It furnishes, however, an excellent statement of the common-law rule. Strictly speaking, even under statutes giving administrators all the rights and powers of executors, as if named in the will, it may be questioned whether at common law an administrator with the will annexed could sell real estate for any purpose, because by virtue of his office an executor had no authority to do any act in connection with his testator's lands, either to sell them for the payment of debts or for any other purpose. And any power given by the will he took in some other capacity than as executor. This, however, is of slight practical importance, because at the present time the lands of a decedent are subject to sale for the payment of debts and legacies, and powers respecting sales for these purposes are taken by virtue of the office itself. And the general rule may be stated to be that a power of sale of land conferred upon an executor for the purpose of paying debts or legacies or for distribution of the proceeds, is a power annexed to the executorial office, to which an administrator with the will annexed will succeed. See, further, *Drummond v. Jones*, 44 N. J. Eq. 53, 13 Atl. 611; *Council v. Averett*, 95 N. C. 131; *Watson v. Martin*, 75 Ala. 506; *Foxworth v. White*, 72 Ala. 224.

The principal case is an authority for the rule that even under a statute purporting to confer on administrators with the will annexed as full powers as if they had been named as executors, a power of sale conferred on an executor by a will can be executed by such an administrator only when the duties to be performed are incident to the executorial office itself. As we have seen, this is undoubtedly the almost universal rule recognized at the present time.

Trust Powers.—It has already been pointed out that an executor may occupy a dual capacity—he may be administering on the estate of the testator, and he may be empowered to execute a trust. In the first case he acts as executor by virtue of his office; in the second, he is acting merely as the donee of a trust power. This distinction is of great importance at this point. Under the previous heading we have seen that an administrator with the will annexed succeeds only to those powers which are executorial in character. Hence, other powers which may be conferred by a will upon an executor, which he does not hold as executor, and which involve the execution of a trust, will not devolve upon an administrator with the will annexed. This is undoubtedly the general rule. It must not be thought, however, that all cases of trust are outside the scope of an executor's duties. In the present state of the law this is not the case. For example, an executor now has authority by virtue of his office to sell the lands of the testator under the order

of the probate court for the payment of debts and legacies. A power of sale conferred by a will for these purposes, then, is clearly within the scope of an executor's duties as such. But such a power is nevertheless coupled with a trust, the creditors or the legatees being the beneficiaries and the executor the trustee. Yet the fact that the power is coupled with a trust does not prevent it from devolving upon and being executed by an administrator with the will annexed, because the duties to be performed in connection with the power are distinctively executorial in character, and, being such, will descend to the administrator.

But where the trust connected with the power of sale is aside from and collateral to the administration of the estate, then the power cannot be executed by an administrator with the will annexed, for it requires the performance of duties not connected with his office. This is the general, though not universal, rule. Where it is the general rule, the practical question in each case is whether the duties connected with the power of sale come within the duty of a trustee, as distinguished from that of an executor. There is more or less uncertainty as to where the line of demarcation is between the duties which fall upon an executor as such, and which may be discharged by an administrator with the will annexed, and those duties which must be performed by a trustee. "The theory upon which the distinction seems to have been founded," as was pointed out by the court in *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367, "is, that the duties of an executor pertain to the office, and those of a trustee to the person; that the character given to a trustee has relation to a personal trust, while that of an executor is official solely." As we have also pointed out, the duties of an executor have been greatly extended by statute, so that duties which were once of a purely trust character and which were collateral to the office of executor are now annexed to the office and survive to an administrator with the will annexed. It may often be a question of some nicety whether the duties conferred are of a purely personal trust character or not, and hence cannot be exercised by an administrator. But whether the power does relate to a collateral trust or not is really a matter of detail, depending largely on the nature of the statutes in force in a particular state. The broad principle remains the same, namely, that if the duties to be performed are distinctively executorial in character, they pertain to the office and survive, while if the duties are connected with a trust outside of the scope of an executor's functions, the power will not survive to an administrator with the will annexed. The cases fully illustrate this vital distinction. Thus in *People v. Huffman*, 182 Ill. 390, 55 N. E. 981, the Illinois statute authorized a sale of realty only when it became necessary to pay debts or legacies; hence these duties alone were deemed executorial, and the court very properly held that "where the will provides for a sale by the executor with power to reinvest, and for the sole purpose of reinvestment, it is not the

discharge of a duty as executor but the discharge of a duty as trustee." To the same effect is *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192. In *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, 22 N. E. 367, already alluded to, it was said that where the duties to be performed were active, in the sense as applied to trusts, the executors are deemed to be trustees, and the powers cannot be executed by an administrator with the will annexed. In this case the testator directed all her property to be sold and the proceeds to be distributed to her brother and sister, each one-third, and the income from the other third to be paid to another sister and her husband. It was held that the imperative direction to sell converted the realty into personalty which were assets in the hands of the executor, and the power to receive the rents and profits of the land between the death of the testatrix and the sale did not qualify the character of the power of sale, and that its execution devolved upon the executors as such and not as trustees. In *Lahey v. Kortright*, 132 N. Y. 450, 30 N. E. 989, the power to sell was coupled with directions to invest the proceeds for the benefit of those interested. This was considered an active trust not within the ordinary powers of executors and survived to trustees subsequently appointed. In *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293, the testator's farm was devised to his executors in trust for the benefit of beneficiaries, and they were also empowered to sell and invest the proceeds on similar trusts, and the court held that an administrator with the will annexed would not succeed to the execution of the trust powers. The rule was thus stated in *Mott v. Ackerman*, 92 N. Y. 539: "Where the will gives a power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor, . . . in such case the power and duty are not those of executors, *virtute officii*, and do not pass to the administrator with the will annexed." But this same case goes on to point out that outside of these cases "the instances are numerous in which, by the operation of a power in trust, authority over the real estate is given to the executor as such and the better to enable him to perform the requirements of the will." Hence the greatest care must be exercised in order to clearly determine whether the trusts are outside the range of the executor's duties, or whether the authority over the real estate is conferred upon the executor by virtue of his office, in order to enable him the better to carry out the will. This rule was laid down in *Calkins v. Smith*, 41 Mich. 409, 1 N. W. 1048, in drawing the line between an executor's duties as such and as trustee, that when an executor has paid the funeral expenses, debts, and legacies, and nothing remains but the division of the residue, his duties as an executor are closed, and any further acts in respect to the estate are done as the donee of a power in trust. This rule is, however, not always decisive in determining whether the duties given to an executor will pass to an administrator with the

will annexed. And especially is this true where a statute has enlarged the powers of the executorial office. Thus in *Foxworth v. White*, 72 Ala. 224, the direction in the will was to keep the estate together for a term of ten years, when the property was to be sold and the proceeds divided among beneficiaries. All the estate was settled here, with the exception of the payment of a few specific bequests which constituted a portion of the estate to be held together. Yet the duties and powers were held to be strictly executorial under statutory provisions increasing the powers of executors, and an administrator with the will annexed who was subsequently appointed was considered competent to execute the powers conferred. Even in Alabama if a personal trust is created to keep the estate together and to sell and reinvest, active duties being conferred upon the executors named, the powers conferred are not strictly executorial, but concern a trust, and will not pass to an administrator: *Hinson v. Williamson*, 74 Ala. 180. See, also, *Anderson v. McGowan*, 42 Ala. 280. However, the Alabama rule is undoubtedly liberal, and a direction that the estate shall remain in the hands of his executrix for the benefit of the testator's children, with a further direction to sell upon certain contingency and divide the proceeds, is a power incident to the office of executor and may be exercised by an administrator with the will annexed. Except where the powers of executors have been extended, a direction to keep an estate together for the benefit of beneficiaries and to sell and invest for a similar purpose would seem to be a trust power and not a power usually annexed to the office of executor, and that an administrator would have no authority to execute it. As holding that a power to manage real property or to sell and invest on certain trusts is of this character, see *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392; *Belcher v. Branch*, 11 R. I. 226; *Hunt v. Holden*, 2 Mass. 168; *Tainter v. Clark*, 13 Met. 220; *Waters v. Margerum*, 60 Pa. St. 39; *Ross v. Barclay*, 18 Pa. St. 179, 55 Am. Dec. 616. But the decisions are not harmonious. While the general rule is recognized that a power of sale, in order to be executed by an administrator with the will annexed, must be given to the executor as such by virtue of his office, and must be connected with the duties of that office, and the complementary rule is equally admitted that where the duties to be performed are collateral to the functions of an executor and involve the performance of the active duties of a trustee, an administrator cannot act, yet in the application of these rules there is conflict. The cases already cited indicate this to some extent. *Harrison v. Henderson*, 7 Heisk. 315, is another case which might reasonably have been decided differently. The will in question provided not merely for a sale of the property and a division of the proceeds. As to this part, the better rule undoubtedly is that such duties are distinctively executorial and may be performed by an administrator. But a portion of the proceeds was to be invested and held upon certain trusts, the income to be paid to a certain beneficiary and the

principal to be given eventually to another beneficiary. This is certainly as plain a trust as could be created. And yet the duties connected with its execution were held to be strictly executorial and hence would pass to an administrator with the will annexed.

Some of the states have, under their statutory enactments, thrown aside all distinction between trust powers and powers strictly executorial, holding that the legislature intended to abrogate all such differences and to confer upon administrators with the will annexed as full powers as an executor would take. In such cases it must not be lost sight of that this does not apply to purely personal and discretionary powers, which can be executed only by the executors named. In North Carolina the most extensive trusts, outside of those purely personal and discretionary, may be executed by an administrator. The statute in that state is very broad in its terms—section 2168 of the code—and reads thus: "In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will." Under this statute, it was held in *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032, that "the administrator with the will annexed becomes a trustee for any trusts declared in the will which could pass and be transferred to anyone, as much as if he had been named executor." Obviously, in states where such statutes and decisions prevail, the distinction we have pointed out between powers of sale distinctively executorial and those connected with some trust collateral to the duties of an executor is of little moment. And this for the reason that executors as such are given the fullest powers over both real and personal property, and an administrator succeeds to these powers. Hence most powers in trust, which involve merely a sale and an investment for the benefit of beneficiaries, are deemed executorial in character. They are for an administrative purpose and will survive. The tendency is to construe powers, if possible, as held by executors *virtute officii*. The California statute is very broad, and under it a power to sell and invest for the benefit of beneficiaries is for an administrative purpose and will pass to an administrator with the will annexed: *Kidwell v. Brummagim*, 32 Cal. 436. The powers of executors in California extend both to real and personal property: See the principal case. In Virginia, it has been held, even under a statute very general in its terms, that a trust power will pass to an administrator. The statute provided that if the executor died before the power of sale was exercised the sale should be made by the person to whom administration with the will annexed was granted. This act is general in its language, and the usual construction would be that it conferred no authority on an administrator to perform duties other than those distinctively executorial. However, in *Brown v.*

Armistead, 6 Rand. 594, under a will empowering an executor to sell land and "to apply the said money to any use or uses he in his discretion may deem best for the benefit of my wife and all my children," it was held that an administrator with the will annexed might make a valid sale of the land and apply the proceeds for the benefit of the beneficiaries. The court very aptly observed that this was a power connected with a trust, and that equity will not allow a trust to fail for want of a trustee. But the court went further and said that the statute was intended to save parties from the delay and expense incident to resorting to a court of equity to appoint a trustee, and held that the administrator could act as the trustee. We question the soundness of this decision. It is one thing to say that equity will not allow a trust to fail for the want of a trustee, and quite a different thing to say that therefore an administrator with the will annexed may, by virtue of his office, perform the trusts conferred upon an executor. This conclusion is not justified. Whether he can perform the trust depends not at all on whether the original trustee is dead or refuses to act, but solely on whether the duties to be performed are of an executorial character or not. The principle set forth in this case that where a power of sale coupled with a trust is given to several executors it will survive for the benefit of the beneficiaries is true when properly applied. We have seen in an earlier part of this note that it does survive to a single executor, or to more than one, if the others die or refuse to act. And, as there stated, such a rule is just and reasonable and manifestly within the intent of the testator. But this doctrine of the survival of trust powers does not extend to administrators with the will annexed, unless the duties to be performed are strictly executorial in character. In this Virginia case it is very doubtful whether the duties to be performed in connection with the power of sale were of such a character. Unless the duties of an executor have been extended by statute, we should say that a power to sell and to hold the money in trust to use for the benefit of named beneficiaries was not an executorial function, but was a trust collateral to the administration of the estate. A similar criticism might be made upon the case of *Evans v. Blackiston*, 66 Mo. 437, which cites the Virginia case with approval. While we question the correctness of these decisions so far as the application of the general doctrine is concerned, yet there is considerable sound sense in them, for the reason that there is less expense and trouble in allowing the administrator to act than there is in severing his trust duties from him and bestowing them upon an appointed trustee and confining the administrator to the ordinary duties connected with his office. As was said in *Evans v. Blackiston*, 66 Mo. 437: "We are not able to perceive any reason why, in the event of his refusal to act, the administrator with the will annexed cannot execute the power under direct legislative warrant, as well as a trustee under an appointment of the chancellor could do." In interpreting the

act itself, the court said: "It was doubtless intended by the legislature, through this enactment, to get rid of the obstructions and subtle distinctions prevailing as to the persons who should be charged with the execution of a power conferred in a will, when the appointee or appointees of the power declined or failed to execute it." Such decisions certainly have the tendency of clearing up the whole matter, and of making plain that which in most of our states has been involved in doubt and uncertainty. We believe the more reasonable rule to be, that as to an ordinary power to sell real estate and invest the proceeds for the benefit of beneficiaries, this should be deemed a power administrative in character and annexed to the office of executor, so that it will pass to and may be executed by an administrator with the will annexed. Even in New York the tendency is toward this rule, though the question seems not to have been definitely settled yet: See *Mott v. Ackerman*, 92 N. Y. 539. Even in these jurisdictions it is not every case of a power in trust that will pass to an administrator. Ordinary trusts he may execute, but there can be such a distinct and independent personal trust that an administrator would have no authority to act: See *In re Final Settlement of Rickenbaugh*, 42 Mo. App. 328. It must not be supposed, however, that because an administrator with the will annexed cannot execute collateral trusts they will fail. Equity will never allow a trust to fail for want of a trustee. Accordingly, where executors occupy a purely trust relationship in the execution of a power of sale, and such duties are not annexed to their office, a court of equity may, upon their death, or refusal to act, or removal, appoint a trustee to carry out the trusts created by the will: See *Lahey v. Kortright*, 132 N. Y. 450, 30 N. E. 989; *Cooke v. Platt*, 98 N. Y. 35; *Greenough v. Welles*, 10 Cush. 571.

The administrator with the will annexed may himself come into equity and ask for the appointment of a trustee to carry out the trust powers created by the will: *Mulligan v. Lambe*, 178 Ill. 130, 52 N. E. 1052; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192. Even where the power of sale might be exercised by an administrator, if one had been appointed, it seems that this will not prevent a court of equity from appointing a trustee to execute the trust power where no administrator has been appointed: *Faile v. Crawford*, 30 N. Y. App. Div. 536; 52 N. Y. Supp. 353. It has been held that where an executor, who is given a power of sale by the will, dies before the testator, an administrator cannot be appointed to execute the power of sale. No power of sale is transmitted to the administrator because none ever vested in the executor. In such a case a court of equity must appoint a trustee to execute the power of sale: *Wilcoxon v. Reese*, 63 Md. 542. We doubt the correctness of such a decision. The opposite has been held, and this is certainly the better rule where the duties are executorial in character and not discretionary: *Drummond v. Jones*, 44 N. J. Eq. 53, 13 Atl. 611.

Delegation of Power of Sale.—Generally speaking, a power of sale conferred upon an executor or other person by a will cannot be delegated by such donee to another. The donee must execute the power himself: *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Floyd v. Johnson*, 2 Litt. 109, 13 Am. Dec. 255; *Neal v. Patten*, 47 Ga. 73; *Black v. Erwin*, Harp. 411; *Winthrop v. Attorney General*, 128 Mass. 258; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2; *May v. Frazee*, 4 Litt. 391, 14 Am. Dec. 159. Especially is this true where a personal trust or discretion is reposed in the donee. Indeed, a power of this kind is generally considered a personal trust and confidence, which cannot be committed to another: *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Berger v. Duff*, 4 Johns. Ch. 368; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2.

It must not be thought, however, that this rule prohibiting the delegation of a power of sale imposes upon the executor the necessity of performing in person every act in connection with the execution of such power. That he cannot under any circumstances delegate the exercise of his judgment and discretion is undoubtedly true: *Berger v. Duff*, 4 Johns. Ch. 368. Some of the cases intimate that any delegation is improper, and that an act done by another cannot be ratified by the donee of the power: *Neal v. Patten*, 47 Ga. 73. A naked power of sale probably cannot be delegated: *May v. Frazee*, 4 Litt. 391, 14 Am. Dec. 159. Few powers of sale, however, are of this character; they are ordinarily connected with other duties. The reason why a power of sale cannot be delegated is that the donor has a right to the personal judgment, care, and skill of his agent, and it is on account of these personal qualifications that the donee is presumed to have been selected by the testator. And the donee is not permitted to intrust his powers to another, since that other might bind the estate by a transaction which the donee himself would not have considered advantageous. But there are some acts to which such reasons do not apply, and other acts with reference to which these reasons are obviated by a subsequent ratification on the part of the donee. Thus where the act to be done requires the exercise of no discretion, as the publication of a notice of the time of sale, its performance may be delegated to another: *Singleton v. Scott*, 11 Iowa, 589. Where no personal confidence or discretion is reposed, the execution of the power may be delegated: *Paul v. Fulton*, 32 Mo. 110, 82 Am. Dec. 124. The mere formal execution of deeds upon terms which are satisfactory to the donee of the power may properly be delegated: *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2. Executors with a power of sale may employ agents to negotiate for the sale of the testator's lands: *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681; *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484; *Lewis v. Reed*, 11 Ind. 239. If the control and discretionary power given to an executor are not delegated to another, the rule is satisfied. Mere mechanical acts may always be delegated:

McCown v. Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484. And even more important acts may be performed by an agent, provided the donee of the power himself has an opportunity to, and does actually, exercise the discretion reposed in him by the testator. Thus where a contract for the sale of lands is made by another than the executor, who has power to sell lands, the contract is made valid when the executor ratifies it, with full knowledge of the facts, since in ratifying he exercises the discretionary powers of his personal trust: Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. Colsten v. Chaudet, 4 Bush, 666, seems to sanction a right in an executor to delegate a power of sale more extensive than is admitted elsewhere. An executor may authorize an agent to negotiate sales and to subdivide land to suit purchasers; provided when the sales are made and reported to the executor he considers such sales advantageous and assents thereto, since by taking such action he exercises all the discretionary powers conferred by the will. The agent's act in negotiating a sale and executing a deed does not bind the estate, except as supplemented by the exercise of the executor's discretion in favor of the transaction. "In order to fully execute the power of sale conferred upon an executor two classes of acts must be performed," said the court in Terrell v. McCown, 91 Tex. 231, 43 S. W. 21: "1. Those involving the exercise of discretion or judgment; and 2. Those which do not, but are merely executive in character; but while it takes both to so execute the power as to bind the estate, and while the former must be performed by the executor and need not be evidenced by writing, the latter may be done through an agent; and there is no rule of law requiring that both classes of acts be performed at the same time or prescribing which shall be done first." The ratification may have to be in writing to satisfy the statute of frauds: Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

An Executor of an Executor, at common law, succeeded to the general rights of his testator, the original executor, in the execution of the will of the first testator. This common-law rule still prevails where not changed by statute. This being so, the question might arise as to whether a power of sale conferred upon an executor would pass to his executor. The rule seems to have been that naked powers would not pass to the executor of an executor, but where the power was conferred upon the first executor in trust and virtute officii, it would survive and pass to his executor: Reeves v. Tappan, 21 S. C. 1. Whether the power of sale is taken by virtue of the office would depend largely on the condition of the law in the state where the power was conferred. Of course, if the first testator intended the executor of his executor to succeed to the power he will do so. And where there is an implied power of sale in the first executor for purely administrative purposes, his executor will succeed to this power: See Chambers v. Tulane, 9 N. J. Eq. 146. In this case it was said: "That the executor of an executor has full power and authority by law to execute the will of

the original testator there can be no doubt; but this power and authority, conferred by law, extends only to the duties properly appertaining to the office of executor. It is the duty of an executor, which the law imposes on him, to pay the debts, distribute the fund, and settle the personal estate of the testator; and these duties are, by law, transmitted to his executor. But it is no part of an executor's duty to sell the real estate; and he cannot meddle with it, unless by authority of the statute in particular cases, or by the express directions of the testator." This question seems to have been of little practical importance, judging from the slight amount of litigation respecting it which has arisen. The problems relative to who may execute a power of sale conferred by a will are those previously discussed. The general rule governing the rights of an executor of an executor is that stated in the first part of this paragraph. A purely discretionary power of sale cannot be executed by the executor of an executor: *Chambers v. Tulane*, 9 N. J. Eq. 146.

ALAMEDA MACADAMIZING COMPANY v. PRINGLE.

[130 Cal. 226, 62 Pac. 394.]

STREET ASSESSMENTS — BOND GUARANTEEING WORK FOR ONE YEAR.—A MUNICIPAL ORDINANCE requiring a contractor for street improvements to file a bond guaranteeing the work for one year from injury by ordinary use is unauthorized, increases the burdens of the property owner, and renders the contract and assessment void.

STREET IMPROVEMENTS — DUTY OF OFFICERS — BONDS.—Municipal officers are charged with the duty of seeing that street improvement work is properly done, and a bond given by the contractor cannot be substituted for the performance of this duty.

Johnson & Shaw and James C. Martin, for the appellant.

Duncan Hayne and William B. Pringle, for the respondents.

227 COOPER, C. This action was brought to foreclose a street assessment lien under an assessment issued by the superintendent of streets of the city of Oakland. Defendants recovered judgment, and this appeal is by plaintiff from the judgment and order denying a new trial. It appears that the contract was let under the street law, and an ordinance duly adopted by the city, which provided, among other things, that all persons bidding for street work shall "file a bond in the sum to be determined by the mayor guaranteeing the work for one year from injury by ordinary use." Was this specification author-

ized by the statute, and did it increase the burdens of the property owner? We think it was unauthorized by the statute and that it increased the burdens of the property owner and made the contract and assessment void: *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701; *Burnett v. Llewelyn*, 32 Pac. 702. In the first case cited the provision required the contractor to give a bond "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract," and it was held that the provision was not authorized and rendered the contract and lien void. In the opinion it is said: "The bond is not only unauthorized by the words of the statute, but by the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required."

It is said that the provision here only guarantees the work, and does not require the contractor to keep the streets in repair, as was the case in *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701. But we are unable to draw any such nice shades of distinction. The contractor under the bond was bound "to guarantee the work for one year from injury by ordinary use." It is a self-evident proposition that the use of a paved or macadamized street by the traveling ²²⁸ public for one year will injure it to some extent, at least. The material of which the pavement is made may wear in places, break, or become injured in others; and under this bond the contractor was required to either make the necessary and proper repairs himself, or the city could make them and recover of him and his bondsmen the cost of such repairs. The amount of such injury by ordinary use is a matter of conjecture. It might be one thousand dollars or much more, but whether more or less the principle is the same. It could make no difference, in case the injury was one thousand dollars, whether the contractor should spend the one thousand dollars in making good the injury by repairing the street himself, or pay it to the city and let the city spend it for the same purpose. Neither does the time make any difference. If a contract to keep in repair for five years is a burden upon the taxpayers,

so is a contract to keep in repair for one year. Such contract is a burden in either case, although differing in degree. No contractor would undertake for nothing, after having fully complied with his contract, to guarantee the work "from injury by ordinary use" for one year. And no matter how carefully and conscientiously the contractor may have complied with his contract in every detail, so as to be entitled to all agreed to be paid him, he must, in addition to having so performed his contract, pay the wear and tear of the street by ordinary use for one year.

It is argued that the bond was required as a guaranty that the work would be well done and that the bidder was responsible. The amount of the bond is not fixed by the ordinance, but is left to the arbitrary discretion of the mayor. He might require a very small bond of one bidder or class of bidders, and a very large one of some other bidder or class of bidders. But it is not necessary to decide as to whether or not the city council could delegate such authority to the mayor. The contention is fully answered in *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701, where it is said: "Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty."

We are unable to distinguish this case from the rule laid down in *Brown v. Jenks*, 98 Cal. 12, 32 Pac. 701.

²²⁹ It is claimed that a different rule has been adopted in other states. An examination of the cases cited has been made, and we fail to find any different rule in any state except where the statute is different from ours. The question has lately been discussed and the authorities reviewed by the supreme court of Oregon in *Portland v. Bituminous Pavement etc. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28, and the rule here adopted approved and followed. The court in conclusion said: "It is clear that under the authorities, based upon what we believe to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the charter." In this case we think it perfectly clear that the assessment against the property of defendants included the additional expense of the repairs of the street for one year, by reason of all damages from injury by ordinary use. This must have been the view taken by all the parties when the bond in this case was prepared and approved by the mayor, for the condition there is "that the said company shall keep in good repair

... for the term of twelve months from the completion and acceptance of the work."

If the views herein expressed are correct, it is not necessary to discuss any other question in the case.

We advise that the judgment and order be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

STREET IMPROVEMENTS—REPAIRS.—A city has no power to incorporate in a street paving contract a condition that the contractor shall keep up repairs for five years, because the effect of the condition is to impose on property owners an added burden for anticipated repairs. An assessment to meet the additional expense of such repairs is unwarranted: *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28.

BYRNE v. McGRATH.

[130 Cal. 316, 62 Pac. 559.]

TRUST FUNDS—IDENTITY—CLAIM AGAINST ESTATE OF DECEASED PERSON.—The beneficiary of a trust fund held by a decedent, who is able to identify such fund, may enforce the trust without presenting his claim against the estate within the time required by law.

TRUST FUND — IDENTIFICATION — INVESTMENT IN DRUG BUSINESS.—In a suit to enforce a trust, evidence that the trustee employed the trust fund of two thousand five hundred dollars, to which was added five hundred dollars of his own, in the purchase of a drug store, stock, and fixtures, and that the business was carried on at a profit until the trustee's death, sufficiently identifies the trust fund, and a contrary finding by the trial court is against the evidence.

TRUST FUND—ADVANCEMENT BY FATHER—MINGLING OF FUNDS.—Where a father, who holds two thousand five hundred dollars in trust for the support of his children, adds thereto five hundred dollars of his own money and invests the whole in a drug business, the father's investment, if not deemed an advancement, simply gives him an undivided interest in the concern, or, if considered as a mingling of his property with trust funds, the whole belongs to such fund on the principle of accession.

TRUST FUND—WHAT CONSTITUTES—IDENTIFICATION—DRUG BUSINESS.—Where trust funds have been invested in a drug business, the question of identity does not relate to the specific items of stock and fixtures constituting the drug store at

the time of the purchase, but to the drug store itself, which is to be regarded collectively as a thing or entity distinct from the material things momentarily constituting it.

TRUST FUND—RIGHT OF BENEFICIARY AS AGAINST CREDITOR.—Beneficiaries of a trust fund held by a deceased trustee, and which has been identified, may enforce such trust against the administrator, and a general creditor of the deceased, who gave him credit upon the belief that he owned the trust property, has no equities superior to theirs, and cannot object to its enforcement.

TRUST—DEATH OF TRUSTEE—APPOINTMENT OF NEW TRUSTEE.—Where property is held by a father in trust for the maintenance, support, and education of his children, the trust does not terminate with the father's death, and a new trustee will be appointed to take charge of the trust fund.

TRUST—WILL—REMAINDER UNDISPOSED OF—SUCCESSION.—Where a wife by her will leaves property to her husband in trust for the maintenance, support, and education of their children, the remainder, not being disposed of by such will, passes by intestate succession one-third to the father and two-thirds to the children.

Alfred D. Mason, for the appellants.

A. J. Ridge, for the respondent.

318 THE COURT. Appeal from judgment for defendant, and from order denying plaintiffs' motion for new trial. The appeal from the judgment was taken more than six months after the entry of judgment, and must be dismissed. The cause was before this court on a former appeal (*Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536), and is thus stated in the report of the case:

"Plaintiffs, who are the children of Michael Byrne, Jr., deceased, commenced this action against the administratrix of his estate and the creditors thereof, seeking a decree that certain property which had come into the possession of the administratrix as the property of the estate was in fact held by their father as trustee in trust for them. . . . The estate of Michael Byrne, Jr., is admittedly insolvent, and the defendants in interest are creditors of his estate with allowed claims. Plaintiffs, having failed to present their claims against the estate within the time contemplated by law, are here seeking to follow, and claim to have followed, and the court finds they did follow, the specific property of the trust through its mutations in form."

On the former appeal—which resulted adversely to the defendant—there were several errors of law that do not occur in the present record. There is, also, now additional evidence which, it is claimed by appellant, establishes the trust and the identity of the trust fund. There is also another important

difference between the case as then and as now presented. On the present appeal many of the facts relied upon by the appellant are specifically found by the court, and on this appeal must be accepted as true.

The case as found by the court is in effect as follows: Plaintiffs and defendant Mary F. Byrne are the children of the deceased, Michael F. Byrne, Jr., and of Mary E. Byrne. The ³¹⁰ mother died January, 1878, leaving a will, which was duly probated, wherein she appointed her husband executor and devised and bequeathed him in trust, for the support, maintenance, and education of the children, all her property, real and personal. Byrne accepted the trust, and as trustee came into possession of two thousand five hundred dollars as part of the trust fund; and on the thirty-first day of December, 1883, invested this sum, with five hundred dollars of his own, in the purchase of "the personal property particularly described in subdivision 4 of said amended complaint," taking the title in his own name, the property so purchased and described consisting of a drug store, stock, fixtures, etc., in the town of Grass Valley.

But the court found, in effect, that neither the personal property so purchased nor the proceeds thereof were traced and identified by the evidence.

The sole question in the case is as to the sufficiency of the evidence to support the finding last cited. The same question is therefore presented as in the former case, viz.: "Whether or not plaintiffs [have] followed the trust fund in its mutations, and have sufficiently identified it to avoid the rule laid down in *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141, which places the beneficiary who is unable so to follow the trust funds in the position of a general creditor of the estate." But as it is now found that the original trust fund was invested in the property described in the complaint, the question will relate only to the proceeds of the trust property.

In addition to the facts found, the following facts appear from the evidence: The business was carried on in the same location by Byrne at a profit of from one hundred and seventy-five to two hundred dollars a month, until his death, December 7, 1887, at which time, as appears from the petition of the administratrix, it was worth five thousand dollars. It was afterward carried on at a loss by the administratrix until it was sold for seventeen hundred dollars. The trust was always acknowledged by Byrne. The court does not find whether the five

hundred dollars used in the purchase by Byrne was intended ³²⁰ by him as an advance to the children, or as an investment on his account. But the circumstances of the purchase of the drug store as detailed by Mrs. Meeks, and his own declarations to his children, and to Mr. Kitts, his attorney, indicate that the former was the case; and, on the evidence, we think the court should have so found. Nor, were it otherwise, would the case be materially affected. The investment of the five hundred dollars on his own account would simply have given to Byrne a corresponding undivided interest in the concern; or if this should be considered as a mingling of the trust property with that of Byrne, the whole, on the principle of accession, would have belonged to the trust fund: Civ. Code, sec. 1025 et seq. It does not appear that any money of his own was subsequently put into the business by Byrne; but from the fact that the store was always a paying concern, and from his narrow circumstances as detailed by Kitts, the contrary is most probable. Were it otherwise—upon the principle already cited—the property thus mingled with the trust fund would have become part of it: Civ. Code, sec. 1025 et seq. It is also clear from the evidence that the advance of five hundred dollars originally made by him, and other advances, if any, have been in fact repaid, and that on an accounting at the death of Byrne the balance would have been largely against him.

The question of identity does not relate to the specific items of stock, fixtures, etc., constituting the drug store at the time of the purchase, but to the drug store itself, which is to be regarded collectively as a thing or entity, or, as it would be called in the civil law, a *universitas rerum*: Mackeldy's Roman Law, secs. 159, 162. The material things belonging to the concern did not constitute the collective thing or *universitas* spoken of as the drug store or business, but were only mutable and transitory parts of it. It was this that constituted the trust fund in question, which was something different from the material things momentarily constituting it and remained the same, though these, like the particles of water in a river, were continually changing. At the time of the sale, therefore, "it was [still] the identical property originally covered by the trust": *Orcutt v. Gould*, 117 Cal. 316, 49 Pac. 188. "The identity of a trust fund consisting of money ³²¹ (it is said in the case cited) may be preserved, so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or

coins, but by showing a separate and independent fund or value readily distinguishable from all other funds." And a fortiori is this true when the fund consists not of money, but of tangible and distinguishable items of property. The case is, therefore, not a case of the conversion of the trust fund into another species of property, but of a clearly identified fund that has retained its original form and essence. Indeed, it is in effect so found. For the finding is that the trust money was invested in the property described in subdivision 5 of the complaint, which refers unequivocally to the property as it existed at the time of the sale, and thus identifies it as it then stood with the property as originally purchased. The subsequent finding of the court to the contrary must be regarded as the result of an erroneous theory as to what the property to be identified was; that is to say, to the error that the trust property consisted of the chattels momentarily constituting the fund at the time of the purchase, and not of the fund itself.

As between the deceased and the plaintiffs the rights of the latter are manifest; nor is there any question here as to the rights of creditors of the concern. The respondent is merely a general creditor of the estate, who loaned money to the deceased in his lifetime. Possibly his (Byrne's) apparent ownership of the property in question gave him a fictitious credit; but if the property in question was originally the property of the plaintiffs, and if—as it now is—it has been identified, he has no equities superior to theirs. The sole question, therefore, is as to the sufficiency of the identification of the trust fund; and as in our opinion this has been satisfactorily made out, the order denying the plaintiffs' motion for a new trial must be reversed.

Some directions will, however, be necessary with reference to the further proceedings. The suit was brought upon the theory that upon the death of Byrne, the trustee, the trust ceased and the trust fund became equitably vested in the children. But by reference to the will it will be seen that the property was not devised in trust for the children generally,³²² but merely in trust for their "maintenance, support, and education." The trust, therefore, cannot extend beyond their lives; and it follows that the remainder was undisposed of by the will, and passed by intestate succession one-third to the father and two-thirds to the children: Civ. Code, sec. 1386, subd. 1. It will be proper, therefore, for the court to appoint a trustee to take charge of the trust fund as successor to the deceased.

The order appealed from is reversed and the cause remanded for new trial and further proceedings in accordance with the above opinion.

TRUST FUNDS.—EQUITY WILL FOLLOW trust funds through any number of transmutations, so long as they can be identified: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994. But before a cestui que trust can claim any specific property, he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof: *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141. However, substantial identity is all that is required: See the monographic note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 128. When a trustee has converted trust funds into money and mingled it with his own, so that it cannot be separated, the beneficial owner occupies the position of a general creditor of the estate: *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261, 33 Am. St. Rep. 302, 31 N. E. 414. An executor can be held to account as trustee where he has come into possession of a trust fund or its substitute: *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

CURTIN v. SALMON RIVER HYDRAULIC GOLD MINING AND DITCH COMPANY.

[130 Cal. 345, 62 Pac. 552.]

CORPORATIONS—SPECIAL MEETING—NOTICE.—Where the by-laws of a corporation do not designate the person by whom a notice of a directors' meeting is to be given, such notice must be given by the secretary, as provided in section 320 of the Civil Code; and a meeting of the directors of which no notice was given to the absentees, and the minutes of which were never approved as provided by the by-laws, is not valid, and the directors assembled can perform no valid corporate act.

CORPORATIONS—QUORUM—INTERESTED DIRECTOR. A director is disqualified from acting in any manner in his official capacity, for the purpose of creating an obligation of the corporation in his own favor; hence a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business.

CORPORATIONS—MORTGAGE TO DIRECTOR.—A directors' meeting of a corporation, at which there is a bare majority of the directors present, cannot authorize the execution of a corporate note and mortgage to one of the directors present, as security for a past debt due him, whether he voted for the resolution authorizing such action or not.

CORPORATIONS—MINING—MORTGAGE RATIFIED BY STOCKHOLDERS.—Ratification cannot give effect to an unauthorized act, unless the person or body making the ratification could in the first instance have authorized the act; hence under a statute making the stockholders of a mining corporation a component part

of the power to make a corporate mortgage, the stockholders cannot ratify an invalid mortgage made by the board of directors, since they cannot by any act of their own make a mortgage.

J. P. O'Brien, for the appellant.

J. B. Curtin, for the respondent.

³⁴⁶ HARRISON, J. This action was brought for the foreclosure of a mortgage upon certain mining property, executed to the plaintiff's assignor by the president and secretary of the defendant. The defendant denied its execution of the note and mortgage, and upon this issue the court found in favor of the plaintiff and rendered judgment accordingly. The defendant moved for a new trial upon the ground that the decision was not sustained by the evidence, and this motion having been denied, has taken this appeal.

The defendant is a mining corporation organized under the laws of this state, having a capital stock of one hundred thousand shares, and is controlled and managed by a board of five directors. The promissory note and mortgage upon which the action was brought were executed to Thomas W. Wells, the assignor of the plaintiff, July 24, 1897. Wells had previously advanced moneys to the defendant, and had taken therefor its promissory note for five thousand dollars, all of which, together with eleven hundred and twenty-five dollars of interest thereon, was then unpaid, and he had also, subsequent to the execution of said note, advanced to it the further sum of seven hundred and sixty dollars. The note and ³⁴⁷ mortgage were executed in pursuance of the following resolution which had been adopted on the previous day at a special meeting of the board of directors, at which there were present only three of the directors, of whom Wells was one:

"Resolved, that this corporation will borrow from Thomas W. Wells the sum of nine thousand five hundred dollars and execute its promissory note therefor, and that the president and secretary of this corporation be and they are hereby authorized for and on behalf of this corporation to execute said promissory note, payable three months after date, and that said corporation secure the payment of its promissory note for the sum aforesaid by a mortgage on all the property owned by this corporation.

"The above loan is for the purpose of paying note and interest held by Thomas W. Wells, and for moneys advanced to protect overdrafts."

The first objection made by the appellant to the validity of the mortgage is that the meeting at which its execution was directed was a special meeting, and that the directors there present were not "duly assembled," and, therefore, could not perform any corporate act. Section 303 of the Civil Code authorizes a corporation by its by-laws to provide for "the time, place, and manner of calling and conducting its meetings," and section 320 of the Civil Code provides that when no provision is made in the by-laws for the mode of calling special meetings "all meetings must be called by special notice, in writing, to be given to each director by the secretary on the order of the president, or, if there be none, on the order of two directors." It is provided in the by-laws of the defendant that "the president or two of the directors may call special meetings of the directors at any time, and notice shall be given of such called meeting by leaving a written or printed notice at the last known place of business or of residence of each director at least one day before the time of meeting. Such service of notice shall be entered on the minutes of the corporation, and the said minutes, upon being read and approved at a subsequent meeting of the board, shall be conclusive upon the question of service." This by-law embodies the provision of section 320 in so far as it designates the persons who are authorized to call a special meeting, but ³⁴⁸ as it does not designate the person by whom the notice is to be given, such notice must be given by the secretary as provided in the section. It was shown by the testimony of the secretary that no notice of the meeting was given to either of the two directors who were absent therefrom, and the minutes of the corporation contain no entry of the service of any notice of the meeting, nor were the minutes of that meeting ever approved at any subsequent meeting of the board of directors. Under well-settled rules it must be held that the directors present at that meeting could not perform any valid corporate act: *Harding v. Vandewater*, 40 Cal. 77; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29.

The respondent does not, in his brief, present any argument in support of the regularity of this meeting, but contends that, notwithstanding this infirmity, the note and mortgage created an obligation on the defendant, by reason of having been authorized at a meeting at which a majority of the

directors were present, and the subsequent ratification thereof by two-thirds of the stockholders.

The respondent relies upon the following provision of section 308 of the Civil Code: "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." Under his construction of this provision it is immaterial whether Wells abstained from voting, or even voted against the resolution. Such construction would, however, enable an interested director to accomplish by indirection what the policy of the law forbids him from doing. It does not appear, either from the minutes of the board or by any testimony in the case, whether Wells voted for the resolution or not. Although he was director of the corporation, yet he was disqualified from voting, or in any mode acting in his official capacity as a director, for the purpose of creating an obligation of the defendant in his own favor: *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. As was said in this case: "So strictly is this principle adhered to that no question is allowed to be ³⁴⁹ raised as to the fairness or unfairness of the contract so entered into"; and in *Shakespear v. Smith*, 77 Cal. 640, 11 Am. St. Rep. 327, 20 Pac. 295, this court said: "In such cases the court will not pause to inquire whether a trustee has acted fairly or unfairly; being interested in the subject matter, he may not as a trustee deal with himself and thus be subjected to the temptation to advance his own interests."

The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position, and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business. Section 305 of the Civil Code declares: "Unless a quorum is present and acting, no business performed or act done is valid as against the corporation." The above provision of section 308 must be read in connection with this provision of section 305, and both are limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation. By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he

could neither vote in favor of the resolution, nor by his presence help to create a quorum by which the other two directors could adopt it. For the purpose of any action upon this resolution he was as much a stranger to the board as if he had never been elected a director, and, although he may have been physically present in the room with the other two directors, he was not for that purpose a component part of the board, any more than would have been any other bystander, and there was not, therefore, a quorum of the board "present and acting" at the time the resolution was adopted.

In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, it was held that a director of a corporation "cannot properly act on or form part of a quorum to act" on a proposition to increase his compensation. In *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137, 169, ³⁵⁰ the chancellor said that a member of a corporation contracting with it is regarded, as to that contract, as a stranger; and held that, as the corporation was managed by five directors, one director could not, with two others, constitute a board to vote a mortgage from the company to himself. This case was afterward reversed upon other grounds, but no dissent from this rule was expressed. In *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235, where the corporation was governed by a board of five trustees, it was held that an agreement made by it in favor of its president, under the authority of a vote of himself and two other trustees, was invalid. Under a similar state of facts in *Butts v. Wood*, 37 N. Y. 317, the court held that the board as thus constituted had no authority to entertain a bill in favor of one of its members, or to do anything in relation to it; that the claimant was disqualified from acting because he could not deal with himself, "and without him there was no quorum of the directors and they had no authority to transact business." In *United States Ice Co. v. Reed*, 2 How. Pr., N. S., 253, the court said: "A trustee whose attendance is necessary to make a quorum cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acted." The reasoning of the court in its opinion in *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516, cited on behalf of the respondent, does not commend itself to our judgment. In New York it has been held that, where an interested director takes part in the passage of the resolution, the corporate act is vitiated whether his vote was essential to its adoption or not: *Anderton v. Aronson*, 3 How. Pr., N. S., 216; *Ashley v. Kinnan*, 2 N. Y. Supp. 574; *Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co.*,

14 Abb. N. C. 103. A contrary rule seems to prevail in Missouri: *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 4 S. W. 264. It is unnecessary, however, in this case to decide which of these rules is correct, inasmuch as, if Wells was not properly a member of the board at this meeting, there was no quorum to act upon the resolution.

After the president and secretary of the corporation had executed the note and mortgage an instrument was signed by the holders and owners of more than two-thirds of the capital stock of the defendant, by which they purported to ratify ³⁵¹ and approve the said mortgage, and it is contended by the plaintiff that under the provisions of the act of April 23, 1880 (Stats. 1880, p. 131), the mortgage thereby became valid and binding upon the defendant.

Section 1 of that act is as follows: "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." This section does not confer upon the stockholders any power to mortgage the property of the corporation, or to authorize the directors to mortgage it, and it is a familiar rule that ratification cannot give effect to an unauthorized or invalid act, unless the person or body making the ratification could in the first instance have authorized the act. The corporate power and business of the corporation must be exercised by the board of directors (Civ. Code, sec. 305), and the stockholders cannot, by their own act, mortgage its property: *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607. Any mortgage, to be effective, must be made by the board of directors, but under the provisions of the above act of 1880 the consent of two-thirds of the stockholders is requisite to its validity. The stockholders are thus made a component part of the power to make a mortgage effective, but cannot, by any act of their own, make a mortgage, or validate one that has not been previously authorized and executed by the board of directors.

Whether the defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not involved herein. The plaintiff seeks by this action the sale of the defendant's property in payment of the note held by him, but, unless the defendant has created a lien

upon the property, the plaintiff cannot maintain the present action for compelling its sale.

The judgment and order denying a new trial are reversed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

CORPORATIONS.—NOTICE OF A SPECIAL MEETING of directors is, as a general rule, necessary: See the note to *Chase v. Tuttle*, 3 Am. St. Rep. 69; *Singer v. Salt Lake etc. Co.*, 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024. The presence of a bare majority or quorum of the directors of a corporation at a special meeting, held without notice to or presence of the remaining directors, does not render the act of such quorum binding on the corporation or stockholders: *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228, 29 N. E. 689.

CORPORATE MEETING—INTERESTED DIRECTOR.—The vote of a director cannot be counted when it is necessary to constitute a majority, if the question is one in which he is personally interested, and without his vote the resolution cannot be carried: See the monographic note to *Beach v. Miller*, 17 Am. St. Rep. 300; *Smith v. Los Angeles etc. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

FREIERMUTH v. STEIGLEMAN.

[130 Cal. 392, 62 Pac. 615.]

HOMESTEAD—COMMUNITY PROPERTY—MORTGAGE TO HUSBAND.—Under a statute forbidding the mortgage of community property upon which a homestead has been declared unless such mortgage is executed by both husband and wife, a mortgage of such property signed by the wife alone to her husband, to secure an indebtedness from her to him, is void even in the hands of an assignee.

HOMESTEAD—MORTGAGE BY WIFE—ESTOPPEL.—A wife, who has executed a mortgage to her husband on community property upon which a homestead has been declared, is not estopped from denying the validity of such mortgage in the hands of an assignee, who had constructive notice of the homestead, and actual notice that the mortgage was executed by the wife alone.

Julius Lee and Frank J. Murphy, for the appellant.

Charles B. Younger and Lindsay & Cassin, for the respondent.

392 CHIPMAN, C. Foreclosure. The court found on sufficient evidence that defendant and one Jacob Steigleman, for many years prior to April 25, 1876, and thenceforward were, and now are, husband and wife; that on July 9, 1892, defendant made and delivered her promissory note to her husband, and

to secure the same executed at the same time a mortgage on certain four separate tracts of land; that long prior thereto, to wit, on April 25, 1876, defendant in due form of law executed and recorded her declaration of homestead on the first three of the tracts embraced in the mortgage, and that they were the community property of the husband and wife; that defendant's husband did not join in making this mortgage or the note; that on December 10, 1892, Jacob assigned the note and mortgage to plaintiff. The court made a decree foreclosing the mortgage as to the fourth tract, but found that plaintiff was not entitled to a decree of foreclosure as to the first ³⁹³ three tracts. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The sole question presented is, Did the mortgage convey these homesteaded lands as security for the note?

Section 158 of the Civil Code provides that: "Either husband or wife may enter into any engagement or transaction with the other . . . which either might do if unmarried," etc. Undoubtedly, the wife may ordinarily mortgage her separate property to her husband.

It has been held that although the wife cannot create a lien on the community property by mortgage, yet the mortgage is not void in the extreme sense; and if the husband afterward dies and the wife inherits the property, the mortgage becomes a lien on the interest thus inherited by the wife, subject to the payment of the debts of the estate: *Parry v. Kelley*, 52 Cal. 334. But we have no such case here. Where the community property is impressed with the character of the homestead, it cannot be conveyed or encumbered unless the instrument by which this is attempted to be done is executed by both husband and wife: Civ. Code, sec. 1242; nor can the homestead be abandoned except by a declaration of abandonment or grant thereof, "executed and acknowledged by the husband and wife, if the claimant is married": Civ. Code, sec. 1243; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167; *In re Lamb*, 95 Cal. 397, 30 Pac. 568; *Security Loan etc. Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732. Appellant does not dispute the correctness of the construction placed upon the statute by these cases, but he claims that they all relate to conveyances to third persons, and are not in point because this was the case of the wife conveying to her husband. He invokes the maxim of the common law

found in section 3532 of the Civil Code: "The law neither does nor requires idle acts." *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715, is cited, where the court held that: "A husband can make a valid conveyance to his wife of his separate real estate, upon which he has declared a homestead which is still subsisting at the time ³⁹⁴ of the conveyance, and he cannot avoid the same upon the ground that such conveyance was without the signature and acknowledgment of the wife." The question here is not whether the wife has an interest in the property which she may convey to her husband, leaving the property impressed with the homestead, as was the fact in the *Burkett* case, but the contention is that she may mortgage the homestead, as such, to her husband without his joining, because it would be an idle and foolish thing for him to mortgage to himself, and hence unnecessary to its validity. But where there is a homestead declared on the community property, as in this case, the law says that the homestead can neither be abandoned nor encumbered nor conveyed, except both the husband and wife execute and acknowledge the instrument by which such alienation or disposition is sought to be accomplished. It is not a question whether the law is to be held to require a vain thing. The law forbids the transfer of the homestead to anyone—to the husband or any other person—except it be done as prescribed by statute. The purpose of the law is to place it beyond the power of either spouse, acting alone, to destroy the homestead character impressed upon the real estate or encumber it in any way. It cannot be said that the law was substantially complied with, or that the husband was relieved from the necessity of signing the mortgage in the present case because he was the mortgagee, for that would still violate the express requirement of the statute. It simply results that the homestead declared on community property cannot be mortgaged by the wife to her husband: 1. Because she cannot alone mortgage it to him or anybody else; and 2. Because the husband cannot mortgage to himself, and therefore his signing the mortgage would not make it any the less illegal. Besides, we can see no good reason for giving the construction contended for. Why should the wife be permitted to mortgage the homestead to the husband to secure money loaned her by him? The maxim of the law relied upon is interposed to supply the want of execution of the mortgage by the husband. But as the husband could not mortgage to himself, ³⁹⁵ how can we make this maxim accomplish more than the husband could have done by

signing the mortgage? It is beyond dispute that the wife alone could not have mortgaged to the plaintiff in this case (assignee of her husband). Why should we put a construction on the statute that would make an exception where she mortgaged to her husband? It would impair the homestead just the same in both cases, and in the latter case would result in giving the husband an interest in it greater than the wife, and would make it possible for him to acquire the entire interest by foreclosure. Construing the statute strictly, the mortgage was clearly invalid, and to give the statute the very free construction contended for would, we think, do violence to the spirit of the law as well as to its letter.

2. It is contended that the wife is estopped from denying the validity of the mortgage: Citing *Tartar v. Hall*, 3 Cal. 263; *Dolbeer v. Livingston*, 100 Cal. 617, 35 Pac. 328. There is no estoppel here; the mortgage was absolutely void. Plaintiff was not misled, for he had constructive, if not actual, notice of the homestead, and like notice also that the mortgage was executed by the wife alone, and he is presumed to have known that the law forbade the making of the mortgage in this manner.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., Henshaw, J., McFarland, J.

A MORTGAGE UPON A HOMESTEAD executed by the wife alone is a nullity: *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910. See, further, the monographic notes to *Alt v. Banholzer*, 12 Am. St. Rep. 683-686, and *Poole v. Gerrard*, 65 Am. Dec. 482-489, on the mortgage and conveyance of homesteads.

PEOPLE v. RUSHING.

[130 Cal. 449, 62 Pac. 742.]

FORGERY—FALSE POWER OF ATTORNEY.—A defendant, who procures a power of attorney from one Elmer Geddes, signed and acknowledged under the name of E. Geddes, with the intent that it shall represent and bind Edwin Geddes who has a bank account evidenced by a bank-book in the name of E. Geddes, is guilty of forgery, where, under the power of attorney, he sells the bank account with intent to defraud the purchaser and receives

a check therefor payable to the order of E. Geddes, and indorses such check in the name of E. Geddes, by himself as attorney in fact.

FORGERY—SIGNING ONE'S OWN NAME.—A man may be guilty of forgery by making a false instrument in his own name, if the name was placed thereon with the fraudulent intent of making the instrument appear to bind another, and of making the writing purport to be the writing of another.

CRIMINAL LAW—REBUTTAL EVIDENCE—IMPEACHMENT.—Where a defendant testifies on cross-examination that he never had a particular conversation with certain individuals, rebuttal testimony to the effect that he did have such conversation is admissible for the purpose of impeachment.

TRIAL—CRIMINAL.—AN INSTRUCTION that "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been," while open to criticism, is corrected by a special instruction "that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved."

APPEAL—CRIMINAL LAW—MISCONDUCT OF ATTORNEY AND JUDGE.—Where a claim of misconduct on the part of the prosecuting attorney and the judge is supported and denied by affidavits which squarely contradict each other, the duty of ascertaining the truth from such affidavits is peculiarly the province of the trial judge, and such discretion will not be interfered with on appeal unless it has been abused.

NEW TRIAL—CRIMINAL CASE—NEWLY DISCOVERED EVIDENCE.—Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court, and the presumption is that such discretion was properly exercised.

Frank H. Short and W. D. Crichton, for the appellant.

Tirey L. Ford, attorney general, and A. A. Moore, Jr., deputy attorney general, for the respondent.

450 COOPER, C. The defendant was charged in the information with the crime of forgery in having, on the thirty-first day of January, 1899, willfully and knowingly uttered and passed as true and genuine a certain false, forged, and counterfeit power of attorney, with intent to cheat and defraud one Levy. He was convicted and judgment entered accordingly. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

1. The main point urged upon this appeal is that there is not sufficient evidence to sustain the verdict. It is the settled rule that if the verdict of the jury is based upon substantial evidence it will not be disturbed, although it may not be supported by a preponderance of the testimony. All questions of conflict of testimony and of credibility of witnesses are wisely

left to the judgment of the jury, they being the exclusive judges of all questions of fact.

⁴⁵¹ In this case, after a careful consideration of the evidence, we think it supports the verdict. It appears that some time prior to the date of the alleged offense one Edwin Geddes had an account amounting to several hundred dollars with the Fresno Loan and Savings Bank, which afterward suspended business and went into liquidation. The account of said Edwin Geddes was evidenced by a bank-book, and the account and book contained the name "E. Geddes." This book and account were, after the suspension of the said bank, assigned by said Edwin Geddes to the First National Bank of Fresno city for collection. The defendant procured a power of attorney from one Elmer Geddes, signed and acknowledged under the name of "E. Geddes." Under this power of attorney the defendant sold the account to one Levy for sixty-five cents on the dollar and received a check from Levy for the amount of eleven hundred and three dollars and seventy cents. The check was drawn payable to the order of E. Geddes. The defendant took the check to the bank, indorsed it "E. Geddes, by his attorney in fact, W. E. Rushing," and the check was paid to defendant. That the money was procured under an assignment made by defendant as attorney in fact of Elmer Geddes, who had no account at the bank, is not disputed. That the power of attorney was signed "E. Geddes," and the assignment to Levy made in the name "E. Geddes," is conceded. Defendant received the money from Levy upon the representation that he was selling the account of "Edwin Geddes" and that he had the genuine power of attorney of said Edwin Geddes. There is no question but that defendant was guilty if he knew that Elmer Geddes, whose power of attorney he held, was not the owner of the account at the bank. The question as to his guilty intent was for the jury, and, if the evidence was such that it could reasonably draw therefrom the inference of guilt, its verdict will not be disturbed: *People v. Swalm*, 80 Cal. 49, 13 Am. St. Rep. 96, 22 Pac. 67.

The defendant uttered a forged instrument and thereby defrauded Levy. This being an unlawful act it is presumed that it was intended. The defendant took the false Geddes twice to a notary public to get his acknowledgment to the power of attorney. He sold the account and book for much less than its ⁴⁵² value. After the power of attorney was drawn defendant asked one Hockenberry to say nothing about the transaction un-

til he got the money. He made contradictory statements as to the whereabouts and identity of Geddes to the witness Bernhard. He made inquiries as to the whereabouts of Edwin Geddes prior to the time he procured the power of attorney from Elmer Geddes. He asked the witness Irwin about Edwin Geddes and as to what kind of a man he was. He said in the presence of the same witness and one Angell, while with Elmer Geddes: "Geddes and I are going to Merced to-night. We are working on a little bank deal here, that if it goes through we will have plenty of money, or money to burn." Defendant testified that he paid the money he received less his commission to one Shanklin, a brother in law of Elmer Geddes. That he paid half his commission to one Shattuck, a real estate dealer, who assisted to find a purchaser for the account. Neither Shanklin, Shattuck, nor Elmer Geddes were called as witnesses. There are other circumstances which strongly point to defendant's guilty knowledge, but the above are sufficient.

2. It is contended that, conceding that defendant had guilty knowledge of the falsity of the transaction, that he was guilty of false personation, and not of forgery. That the signing of his own name by Elmer Geddes to the power of attorney would not constitute forgery, although the signature was intended by Elmer Geddes and defendant to be used as the signature of Edwin Geddes with a fraudulent purpose. We do not so understand the law. Every person who, with intent to defraud another, falsely makes, utters, or publishes a power of attorney, knowing the same to be false or forged, is guilty of forgery: Pen. Code, sec. 470.

A man may be guilty of forgery by making a false deed or instrument in his own name, if the name was placed upon the instrument with the fraudulent intent of throwing the onus of the obligation upon another, and of making the writing purport to be the writing of another. A man who forges another's name cannot excuse himself upon the ground that the name happened to be identical with his own: 2 Bishop's New Criminal Law, sec. 587; 2 Russell on Crimes, 9th ed., 718 et seq.; *People v.* 453 Peacock, 6 Cow. 72; *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49. Because the initial of Elmer Geddes' name is "E," he will not be allowed to forge the name of every other Geddes in the state whose initial might be "E," and in defense claim that he was only signing his own name. If the power of attorney was made and signed by Elmer Geddes for the fraudulent purpose of getting the money of Edwin Geddes, which was on deposit in

the bank, and if defendant knew all these facts and uttered the power of attorney for the purpose of making the sale to Levy, knowing that Levy believed it to be the power of attorney of Edwin Geddes, he committed the crime of forgery.

3. There was no error that would justify a reversal in the admission of the testimony of the witnesses Irwin and Angell in rebuttal. Counsel concede the rule correctly when they say: "Ordinarily, the order of proof is in the discretion of the trial court, and when there is not an abuse of discretion a case will not be reversed solely because the order of proof is varied somewhat from its customary or even from its proper channels." The court did not abuse its discretion in the admission of this testimony. The evidence was also proper for the purposes of impeachment. In the cross-examination of the defendant he was asked relative to his inquiries as to the whereabouts of Edwin Geddes, and also as to whether or not the conversation occurred in which he said he was going to Merced on a bank deal. He said: "I did not have a conversation with Con Angell and Jack Irwin or anyone else being present in which I stated in substance and effect that I and Geddes were going to Merced that night on a bank deal, and if it went through we would have money to burn; no such conversation took place anywhere at any time."

The testimony objected to as rebuttal was to the effect that defendant did have such conversation, and was admissible for the purpose of impeachment.

4. It is claimed that the court erred in giving the following instruction: "You are further instructed that while every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved, still where the evidence is entirely circumstantial, yet it is not only consistent ⁴⁵⁴ with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been."

The instruction is copied from the opinion of Judge Sander-son in *People v. Cronin*, 34 Cal. 202, and while criticised was held not to be error in *People v. Dole*, 122 Cal. 495, 68 Am. St. Rep. 50, 55 Pac. 581. In the latter case, in an opinion written by the chief justice, the instruction is criticised as being "inexact and illogical," but it was held that the vice was corrected by the special instruction (as in this case) "that every fact essential

to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved."

5. It is claimed that the district attorney was guilty of improper conduct, in his address to the jury, in commenting upon the defendant's evidence and his occupation, and that the judge was guilty of improper conduct in keeping the jury out too long, and in a remark made to defendant's attorneys when interrupted while reading instructions to the jury. In support of the claim the defendant's attorneys read their own affidavit in which they set forth what they claim to be the facts. The prosecution read in reply the affidavits of the district attorney, his deputy, and the judge. It is sufficient to say that these affidavits on behalf of the prosecution were squarely contradictory of the affidavits of defendant as to all material matters tending to show misconduct either of the district attorney or the judge. The duty of ascertaining the truth from the affidavits was peculiarly the province of the judge who tried the case, and we would not interfere unless it clearly appears that such discretion was abused. In this case we do not feel justified in interfering with the conclusion reached by the judge who heard the evidence, and who personally knew of all the proceedings as they occurred in the courtroom.

6. The court did not err in denying the motion for a new trial on the ground of newly discovered evidence.

"A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor, and a ⁴⁵⁵ party who relies upon that ground must make a strong case, both in respect to diligence on his part in preparing for the new trial and as to the truth and materiality of the newly discovered evidence, and that, too, by the best evidence obtainable; and if he fails in either respect, his motion must be denied": *People v. Freeman*, 92 Cal. 359, 28 Pac. 261.

Applications of this kind are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised. There are many affidavits in the record, some in direct conflict with others. The trial court was in a far better position than this court to pass upon the truth of the matters contained therein.

We have examined the other alleged errors, and find nothing that would justify a reversal of the case.

We advise that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J.,
Garoutte, J., Van Dyke, J.,
Harrison, J., Henshaw, J.

FORGERY.—IF THERE ARE TWO PERSONS OF THE SAME name, and one of them signs that name to notes with the intention that they shall be used in trade as the notes of the other, the act is forgery: *Beattie v. National Bank*, 174 Ill. 571, 66 Am. St. Rep. 318, 51 N. E. 602; *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49.

FORGERY.—ON WHAT INSTRUMENTS are the subject of forgery, see the monographic notes to *Hendricks v. State*, 8 Am. St. Rep. 466-470; *Arnold v. Cost*, 22 Am. Dec. 306-321.

EACHUS v. LOS ANGELES.

[130 Cal. 492, 62 Pac. 829.]

MUNICIPAL CORPORATIONS—LIABILITY FOR GRADING STREETS.—Under a constitutional provision which prohibits private property from being taken or injured for public use without just compensation being made therefor, a municipal corporation is liable for damage caused to the owner of an abutting lot by excavating a street in front thereof.

TRIAL—STRIKING OUT EVIDENCE—DAMAGES—ISSUES UNDER PLEADINGS.—In a suit to recover damages caused by street grading, where the complaint alleges that the grading cut off access to the plaintiff's property and utterly destroyed the value thereof, a motion to strike out all the evidence tending to prove damages from any other cause than by cutting off access to the property is properly denied, where the answer denies that any damage was done to the property, and any uncertainty in the complaint was waived by failure to interpose a special demurrer.

PLEADING—DEFECT IN FORM—DEMURRER.—A complaint defective in form and not in substance can be attacked only by a special demurrer on the ground of uncertainty or ambiguity, and on the trial no objection is open to inquiry except the want of jurisdiction, or that it fails to state facts sufficient to constitute a cause of action.

Walter F. Haas, city attorney, for the appellant.

E. Edgar Galbreth and D. C. Morrison, for the respondents.

494 COOPER, C. This appeal is from a judgment in favor of plaintiffs and from an order denying defendant a new trial.

The action was brought to recover damages caused by the excavation of First street in front of plaintiffs' lot. Plaintiffs were the owners of a lot in the city of Los Angeles, bounded

on the east by Boylston street, on the west by an alley, and on the south by First street, said lot being a rectangle fifty feet wide by one hundred and forty-two feet long running lengthwise along the north side of First street. The defendant, by ordinance duly adopted, established the grade of said First street some twenty-eight feet lower than the surface of plaintiffs' lot, and in pursuance of said ordinance proceeded to and did excavate said First street and remove the earth therefrom to the official grade, and up to ⁴⁹⁵ the south line of plaintiffs' lot, the full length thereof. The grading of said street resulted in leaving the plaintiffs' lot on the north side of said street some twenty-eight feet above the official grade, thus cutting off plaintiffs' access to their said lot and tending to depreciate the value thereof. The court found the plaintiffs' damage to be twelve hundred dollars.

It is claimed that the city, as a municipal corporation, is not liable to the owners of adjoining lots by reason of the excavation of the public streets of the city to the official grade. This, no doubt, was the rule under the former constitution of 1849, article 1, section 8—"nor shall private property be taken for public use without just compensation." In 1879 the present constitution was adopted by the people and the provision was changed so as to read, "private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner": Const., art. 1, sec. 14. Under the above provision of our fundamental law it has been settled in this state—and in accord with the great weight of authority in other states under similar constitutional provisions—that the municipality is liable for damage caused to the owner of an abutting lot by excavating a street in front thereof: *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750. In the *Eachus* case the authorities are reviewed at length and the reasons for the rule stated, and we deem it unnecessary to repeat them here. The remedy is not against the contractor unless he departs from the line of the official grade. The city, in the establishment of the official grade of a public street and in excavating and grading the street to the official grade, acts through its legally elected and qualified officers. When it lets a contract for the grading of the streets, which it had the authority and power to let, it assumes the responsibility of paying all damages necessarily caused to private property by such grading. If the contractor should, of his own volition, go beyond his contract, either in the width or depth

of the grade, or perhaps in other respects, the rule would be different.

Defendant made a motion to strike out all the evidence of plaintiffs tending to prove damages to the lot from any other cause or reason than by cutting off the access thereto. This ⁴⁹⁶ motion was denied, and defendant now claims that such ruling was error. Defendant's contention is that the complaint does not allege damage in any other manner or way than that the grading rendered the street impassible and cut off access to plaintiff's property. We do not think the complaint susceptible of such narrow construction. It alleges that the grading "rendered the said Boylston street and said alley useless and impassable and rendered access to plaintiffs' said property by said street and alley impossible, and utterly destroyed the value thereof, to the damage of plaintiffs in the sum of three thousand dollars." The words "value thereof" were evidently intended by the pleader to refer to the antecedent property. The most that can be said is that the sentence is somewhat ambiguous. This could have been reached by special demurrer, but no special demurrer was interposed, and we think the pleading sufficient as the record appears. The only demurrer was a general one, and upon this being overruled the defendant answered. In the answer defendant denied "that it utterly destroyed the value of either said property or said alley or streets, or either of them, either to plaintiffs' damage in the sum of three thousand dollars, or any damage or at all, . . . or that it damaged plaintiffs' property, or any property, or the property in said complaint described, either in the sum of three thousand dollars, or in any other sum, or at all." It thus appears that the defendant did not raise the point by demurrer as to the ambiguity of the complaint. That it understood the complaint to allege that the value of the property was destroyed, when it denied in its answer that it destroyed the value. Pleadings under our system must be liberally construed with a view to substantial justice between the parties: Code Civ. Proc., sec. 452.

It is the duty of the court at every stage of the proceedings to disregard any defect in the pleadings which in the opinion of the court does not affect the substantial rights of the parties: Code Civ. Proc., sec. 475. If a complaint is defective in form and not in substance, such defect can be reached only by special demurrer that the complaint is ambiguous or uncertain: *Merritt v. Glidden*, 39 Cal. 564, 2 Am. Rep. 479. On the trial

no objection ⁴⁹⁷ to the complaint is open to inquiry except the want of jurisdiction, or that it does not state facts sufficient to constitute a cause of action: *Tennant v. Pfister*, 45 Cal. 272.

It follows that the judgment and order should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

STREETS, CHANGING GRADE OF.—Under a constitutional provision that private property shall not be taken or damaged for public use without compensation, a recovery may be had in all cases where property has sustained substantial injury from grading or changing the grade of a street by a city: See the monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 837; *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341.

WHITE v. WHITE.

[130 Cal. 597, 62 Pac. 1062.]

RECEIVERS—SALE AFTER FINAL JUDGMENT—JURISDICTION.—Where a receiver has been appointed to take charge of property pending a suit for divorce, but who does not take possession of any property, the object of his appointment and the functions invested in him terminate with the entry of final judgment, after which the court has no jurisdiction to direct the receiver to sell the property in question, to satisfy a simple money judgment for alimony.

RECEIVERS—POWER TO APPOINT—ENFORCE MONEY JUDGMENT.—The power of a court to appoint a receiver exists only in the cases provided by statute; hence a statute providing for such appointment "after judgment to carry the judgment into effect," applies only to cases where the judgment affects specific property, and has no application to a simple money judgment, which can be enforced by a writ of execution.

JUDGMENT—FINAL—FURTHER RELIEF.—A final judgment is conclusive both as to the relief granted and as to the relief denied or withheld, and upon its entry the jurisdiction of the court over the subject matter and the parties is exhausted; hence any further judgment or order materially varying the judgment is a nullity.

R. R. Bigelow and A. A. Sanderson, for the appellant.

Henry E. Highton, William T. Baggett, and Walter H. Linforth, for the respondent.

⁵⁹⁸ VAN DYKE, J. Appeal by the defendant Rohrbough from an order made on the application of the defendant, Frankie White, directing the issue of a writ of assistance. The case, stripped of immaterial circumstances, is this:

In a suit brought by the plaintiff against the defendant, Mrs. White—in which she had filed a cross-complaint—an interlocutory judgment was entered in her favor for divorce; and afterward, February 9, 1895, a final judgment for one hundred thousand dollars.

A receiver had been previously appointed to take charge of plaintiff's property, though in fact he had not taken any of it into possession. By the final judgment the receivership was continued with authority and direction to the receiver to prosecute suits and "take any and all legal measures and proceedings to enforce and secure the collection of the unpaid monthly allowance theretofore awarded, etc., and also the said sum of one hundred thousand dollars awarded (to the defendant) by said final decree."

Afterward, April 12, 1895, an order was made directing the receiver to sell property of plaintiff, including the lands now in question. Under this order the property was sold by the receiver to Mrs. White, to whom, after confirmation by the court, it was conveyed August 13, 1896. Subsequently, she ⁵⁹⁹ applied to the court for a writ of assistance to obtain possession of the land, and thereupon the order appealed from was made. At the time of the sale by the receiver the appellant Rohrbough was in possession of the lands in question under leases from the plaintiff, which expired pending the application for the writ of assistance.

The question involved is as to the jurisdiction of the court to make the order of sale of July 17, 1895; and we are of the opinion that this cannot be sustained.

The judgment in the case is not in any way affected by the provision as to the receiver. The receiver had not taken possession of any property; and the object of his original appointment, and the functions originally vested in him, terminated with the entry of the judgment. Any new duties conferred upon him by the judgment were in excess of the jurisdiction of the court, whose power to appoint a receiver exists only in the cases prescribed by the Code of Civil Procedure, section 564—of which this is not one: French Bank Case, 53 Cal. 495. The power under subdivision 3 (a new provision of the code) to appoint a receiver "after judgment to carry

the judgment into effect," applies only to cases where the judgment affects specific property—as in *Guy v. Ide*, 6 Cal. 101, 65 Am. Dec. 490, *Hill v. Taylor*, 22 Cal. 191, and other cases cited in the annotated Code of Civil Procedure, section 564. The provision has no application to a simple money judgment; in such case the writ of execution furnishes an amply sufficient remedy, and is the only means provided: Code Civ. Proc., secs. 682, 684. The judgment here can only be regarded as an ordinary money judgment.

The judgment rendered was a final adjudication of the rights of the parties, and was conclusive, not only as to the relief granted, but as to the relief denied or withheld: Code Civ. Proc., sec. 1908. Upon its entry the jurisdiction of the court over the subject matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute. "By section 1049 of the Code of Civil Procedure, the cause had then ceased to be pending in the court, and the court was without jurisdiction to render any further judgment therein": *Bracket v. Banegas*, 99 Cal. 627, 34 Pac. 344; *Carpentier v. Hart*, 5 Cal. 406; *Bell v. Thompson*, 19 Cal. 706; 2 Notes to California Reports, 130; *Freeman on Judgments*, secs. 141, 142; 1 *Black on Judgments*, sec. 306. After final judgment any further judgment, or order materially varying the judgment, is a mere nullity: *Barry v. Superior Court*, 91 Cal. 486, 27 Pac. 763; *In re Barry*, 94 Cal. 562, 29 Pac. 1109; *Hubbard v. Moss*, 65 Mo. 647; *Ross v. Ross*, 83 Mo. 100.

Doubtless the court may in its judgment provide for further action in order to furnish complete relief. But in such cases the judgment, as to such matters, is not final. Here there was no provision of the kind, and the judgment was final as to all matters involved. The order complained of was not designed to carry into effect the judgment rendered, but is in effect a new adjudication in the nature of a decree of foreclosure depriving the plaintiff of property held by him under constitutional guaranties, and of which he cannot be deprived without due process of law.

The order appealed from is reversed and the cause remanded, with directions to dismiss the proceeding.

Temple, J., Harrison, J., McFarland, J., Henshaw, J., Garoutte, J., and Beatty, C. J., concurred.

Rehearing denied.

THE JURISDICTION OF A COURT IS NOT EXHAUSTED until the judgment is satisfied: *Dorr v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106. But it is terminated when the cause of action is extinguished: *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 17 Am. St. Rep. 131, 42 N. W. 232.

ON RECEIVERS IN DIVORCE PROCEEDINGS, see the monographic notes to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 67, 68; *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 368; *Cortleyeu v. Hathaway*, 64 Am. Dec. 495.

ON RECEIVERS TO ENFORCE JUDGMENTS, see the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 93.

COIT v. WESTERN UNION TELEGRAPH COMPANY.

[130 Cal. 657, 63 Pac. 83.]

TELEGRAPH COMPANIES—DEGREES OF NEGLIGENCE—FINDING.—Degrees of care and of negligence are recognized in California; and in a suit to recover damages for a mistake in the transmission of a telegraphic message, a finding that the telegraph company was not guilty of any negligence whatever is equivalent to an express finding that such company used great care in the transmission and delivery of the message, within the meaning of a statute requiring a carrier of messages to use great care and diligence in their transmission and delivery.

TELEGRAPH COMPANIES—LIMITATION OF LIABILITY—UNREPEATED MESSAGE.—The sender of a telegraphic message is bound by a stipulation contained in a written message that the telegraph company will not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of an unrepeated message, and in such case he can recover only where the company is guilty of willful misconduct or gross negligence in the performance of its duty.

TELEGRAPH COMPANIES—LIMITING LIABILITY—CONTRACT BINDING ON RECEIVER OF MESSAGE.—Where the sender of a telegraphic message acts as the agent of the receiver, the contract made by the sender with the telegraph company is binding on the receiver of the message.

TELEGRAPH COMPANIES—ACTION BY RECEIVER OF MESSAGE—CONTRACT OR TORT.—Where no question of privity of contract arises between the sender and the receiver of a telegraph message, the receiver may rest his right of action against the telegraph company on tort for a breach of public duty; but where the receiver is a party to a special contract, either directly or indirectly through the sender as his agent, and brings his action against the company, he must stand upon his contract rights.

TELEGRAPH COMPANIES—GROSS NEGLIGENCE—ATMOSPHERIC DISTURBANCE.—A finding that a telegraph company was not guilty of gross negligence in sending a message will not be disturbed, where the mistake was occasioned by atmospheric disturbances, but the wire was otherwise in good working order, and more than two hundred messages were correctly sent

the same night; the mere fact that a storm was raging over the route will not of itself establish gross negligence in attempting to forward a message.

Crittenden Thornton and F. H. Merzbach, for the appellants.

George H. Fearons and R. B. Carpenter, for the respondent.

659 GAROUTTE, J. Plaintiffs telegraphed to W. B. Dennis, at St. Louis, asking him to telegraph them the lowest cash price for two hundred and twenty tons of forty-pound steel rails. The message was correctly delivered, and in answer thereto Dennis telegraphed to plaintiffs the price to be thirty-seven dollars per ton. This dispatch was delivered in due time, ⁶⁶⁰ but when delivered it read twenty-seven dollars per ton, the mistake in the message having occurred in transit by reason of atmospheric disturbances. Relying upon the words of the message as delivered, plaintiffs entered into contracts to buy and sell steel rails, and great damage resulted to them by reason of the mistake of defendant, heretofore stated. To recover this damage the present action was brought.

The facts of the case are largely agreed upon, and, in addition, the court made a finding of fact as follows: "The defendant, Western Union Telegraph Company, was not guilty of gross or any other degree of negligence in the transmission of the message of Dennis to the plaintiffs, nor was the error or mistake in the said dispatch of said Dennis, as the same was delivered to said plaintiffs, due to or caused by the gross or any other degree of negligence of the said defendant, Western Union Telegraph Company." Upon the facts judgment was rendered for defendant, and this appeal from the judgment and order denying a motion for a new trial is now before us. This finding in favor of defendant of no negligence is essentially a finding of the ultimate fact in the case, and will be so treated by the court in the consideration of the merits of this appeal.

The Civil Code, section 2162, declares: "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." In many jurisdictions it is held that the phrase "gross negligence" is a misnomer, and that the adjective "gross" in no way qualifies the noun "negligence." But in this state the rule is recognized to the contrary, not only by the decisions of this court, but by many sections of our Civil Code. The phrases "gross negligence" and "slight negligence" are found in common use in the law of this state, and, being so used, each must be held to have a distinctive meaning. The defendant in this case was required to use great care

in the transmission and delivery of this message. The court found that in the transmission and delivery of the message defendant was not guilty of any negligence. Not being guilty of any negligence whatever, defendant must be held to have used great care; and the finding of fact quoted is the equivalent of an express finding that defendant used ⁶⁶¹ great care in the performance of its duty in the transmission and delivery of the message here involved. But in view of the conclusion at which the court has arrived, it is unnecessary to determine whether or not the evidence in this case is sufficient to support a finding of fact to the effect that defendant was not guilty of any negligence whatever; and this conclusion is based upon the following reasons: The written message which was delivered by Dennis to defendant, to be sent to San Francisco and delivered to plaintiffs, contained the following regulation and stipulation bearing upon defendant's duties and liabilities: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." In this case the message sent from St. Louis to plaintiffs was not a "repeated message."

The foregoing stipulation constituted a valid and binding contract between Dennis, the sender, and the defendant company. As to its validity and binding force in this state, at least, the law may be considered settled: *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; *Redington v. Pacific Postal Tel. etc. Co.*, 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. Rep. 1098. These authorities declare the rule of this state upon the question. It follows, therefore, that if Dennis, the sender of the message, was bringing this action against defendant for damages suffered by him, he would be bound by the agreement made, and could only recover in case defendant was guilty of willful misconduct or gross negligence in the performance of its duty. The interesting question then presents itself: Do these plaintiffs, the addressee and receiver of the message, stand in a better position, as against defendant's negligence, than does Dennis, the sender of the message?

In England it is held by the courts with entire unanimity that the addressee of a message has no right of action against the telegraph company for failure of performance of duty. And

this conclusion is based upon the proposition that the relation between the parties is purely one of contract, and the ⁶⁶² addressee is not a party thereto. In this country it may be deemed settled law that the addressee has a right of action against the telegraph company when by its negligence he has suffered damages. At the same time the different reasons given by the different courts in adopting this rule of law are many. We will not here enter into a discussion of the general principles governing litigation arising between individuals and telegraph companies in the matter of sending and receiving messages, but will confine ourselves to a consideration of the law bearing upon the facts of this particular case.

Plaintiffs telegraphed to Dennis, in St. Louis, requesting him to send by telegram the price of two hundred and twenty tons of steel rails. In pursuance of that request Dennis telegraphed the desired information. It is thus plain that Dennis performed service for plaintiffs at their request. And that being so, we deem the conclusion irresistible that in the performance of the service Dennis was acting for plaintiffs and was their agent. The fact that plaintiffs by a telegram requested him to perform this service is immaterial. They could have made the request with the same legal result either by letter or parol. If a party residing in St. Louis had been engaged for a consideration by plaintiffs to telegraph them the information here desired, and that party had done so, certainly such party would have been the agent of plaintiffs. Yet the fact, if it be a fact, that no consideration was paid by plaintiffs for the performance of the service by Dennis is not a material element in the consideration of the question of agency. Dennis, in sending the message, being the agent of plaintiffs, they were bound by the contract made with the defendant. Plaintiffs, by requesting him to send the message, necessarily authorized him to contract with defendant as to how that message should be sent. And this general authorization was sufficiently broad to include the agreement as to nonliability heretofore set out, and, therefore, the agreement was binding upon the principal, these plaintiffs.

In discussing this identical question, Thompson on the Law of Electricity, section 237, says: "In such a case, is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the ⁶⁶³ receiver has against the company rests upon privity of contract and depends upon the circumstances that the sender was his

agent—in other words, if the contract with the telegraph company was the contract of the receiver through his agent, the sender—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender.” Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation, and, having power to make it, his principal can only stand in his shoes. But it is said the action of the addressee of a message is founded upon tort, namely, a breach of public duty, and that therefore the question of contract does not enter into it. Yet, in a case like the one at bar, it may with equal legal propriety be said that a cause of action by Dennis against defendant would be founded on tort, namely, a breach of public duty, and thus eliminate any question of contract from the case. But this court has said that it cannot be done, and that Dennis must stand upon his contract as made. In cases where no question of privity of contract arises between the sender and the receiver of a message, the addressee may rest his right of action on tort; but where a party to a special contract, either directly or indirectly through the sender, his agent, brings his action against the company, he must stand upon his contract rights.

We find many cases which support the conclusion at which we have arrived. The roads traveled by courts in arriving at this conclusion are many, yet those roads all lead to the same destination. In the leading case of *Ellis v. American Tel. Co.*, 95 Mass. 226, 238, no question of agency was adverted to in the opinion, yet the court said: “Besides, it is difficult to see how the plaintiff, who claims through a contract entered into by the sender of the message with the defendants, which created the duty and obligation resting in the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly, a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived.” In *Curtin v. Western Union Tel. Co.*, 38 N. Y. Supp. 58, 16 Misc. Rep. 348, 664 it is said: “The stipulation for exemption from liability contained in the printed blank of the company, upon which the sender writes his message constitutes a contract which binds him and the person to whom the message is addressed, if the assent of the sender to such stipulation can be assumed.” In *Aiken v. Western Union Tel. Co.*, 5 S. C. 371, it is held: “It is

equally clear that any stipulation of an express nature intended to mold and limit his obligation must be construed as attaching to the obligation in its fullest extent and affecting equally all the persons related to it, either as sender, receiver, or agent of transmission. Under this view of the contract the plaintiff is entitled to enforce its performance as a direct party in interest." In *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 556, 30 How. Pr. 403, we find this language: "When the defendants, therefore, undertook and were paid for sending the message, their contract was with the plaintiff, through his agent, and the action for a breach of it was properly brought by him." There is some authority opposed to the general tenor of the cases cited, as, for example, *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 303, 78 Am. Dec. 338, and *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. But no question of agency appears to have been involved in those cases, and it is upon the contract made by Dennis with the defendant and the privity of contract existing between Dennis and plaintiffs that we plant our conclusion upon this branch of the case.

In view of what has been said, the remaining question presents itself, Has defendant been guilty of willful misconduct or gross negligence? No question of willful misconduct is presented by the record, and the question then is, Does the evidence support the finding of fact that defendant was not guilty of gross negligence? Gross negligence is defined to be "the want of slight diligence." "Gross negligence is an entire failure to exercise care, or the exercise of so light a degree of care as to justify the belief that there was an indifference to the things and welfare of others." "Gross negligence is that entire want of care which would raise a presumption of the conscious indifference to consequences": See *Redington v. Pacific* ⁶⁶⁵ *Postal Tel. etc. Co.*, 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432. It is conceded that the mistake in the message was occasioned by atmospheric disturbances, and that "it is impossible to overcome the action of the elements upon the wire and repeaters with any kind of care and diligence."

Plaintiff's counsel in his brief says: "In this case negligence does not consist in the manner in which the act was attempted to be done, but in the attempt to do the act at all." The mistake in the message arose in transit between Denver and Los Angeles. And in view of the fact that the message had arrived at Denver from St. Louis in due time and in proper form, there is no showing of gross negligence up to this point. Es-

pecially is this true in view of the further fact that when the message arrived at Chicago from St. Louis in transit to San Francisco, the only open line of communication to the point of its destination was via Denver and Los Angeles. It follows that counsel's claim is, that in view of the general atmospheric disturbances going on between Denver and Los Angeles defendant should have held the message at Denver until climatic changes for the better had taken place.

There can be no question but that it was the duty of defendant to forward this message from Denver at the earliest practicable moment. Our statute in terms demands it. Now, this message was received at Denver at 1:55 A. M., February 20th, and a great storm was then prevailing at intervals of distance and intervals of time between that point and Los Angeles. During the night of the 19th-20th more than two hundred messages were transmitted over the line in question from Denver; the operator at Denver knew the line had been working badly by reason of the storm, and at times it was impossible to get a message through. The line was working badly at the time the message was received at Denver, and had been so working off and on all night. But at the time the message was sent from Denver, about 5 A. M., the wire was in good working order. The two operators at Denver and Los Angeles respectively engaged in sending and receiving the aforesaid two hundred messages subsequently never heard of any complaint as to the manner of their transmission. Under the circumstances here depicted defendant was required to do either ^{one} one of two things, namely, hold the message at Denver for an unlimited time, or send it on its way. And, testing the facts in view of the meaning of the words "gross negligence" as the law defines them, this court cannot say that the finding made by the trial court to the effect that defendant was not guilty of gross negligence has no support in the evidence. The wire at the time the message was sent "was in good working order." The fact that a storm was rioting over the route should not of itself convict defendant of gross negligence in attempting to forward a message. If that be the law, then messages would not be sent for days at a time, or even weeks, during the winter season. The important question is, What is the condition of the wire? Is it in good working order? And is there a reasonable probability that the message as sent will arrive at its destination? Here the salient fact appears that the wire was in good working order when the message was sent. Taking the evidence altogether, the finding

of the court that there was no gross negligence upon the part of the defendant will not be disturbed.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

TELEGRAPH COMPANY—LIMITING LIABILITY.—A regulation by a telegraph company limiting its liability for mistakes or delays in transmitting unrepeatd messages is valid: *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 50 Am. St. Rep. 374, 61 N. W. 645. Compare *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068. If a telegraph company causes injury by its neglect in transmitting a message, no contract between it and the sender will bar a recovery: *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 38 S. W. 1068; *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 77 Am. St. Rep. 791, 50 Pac. 438.

STIPULATIONS IN TELEGRAPH BLANKS, whether binding on the receiver of a message, are discussed in the monographic note to *Webbe v. Western Union Tel. Co.*, 61 Am. St. Rep. 214-218.

TELEGRAPH COMPANY.—THE REMEDY OF THE RECEIVER of a telegraphic message for negligence in transmitting it, where no contract relation exists between him and the company, is an action in tort: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4; *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WHEELER v. HOME SAVINGS AND STATE BANK.

[188 Ill. 34, 58 N. E. 598.]

CORPORATIONS—ACTS ULTRA VIRES—RATIFICATION.—A private corporation has no power to lend its credit to another, or to pledge its property to secure the debt of another, in a matter in which it has no interest, or which is not for its benefit. Such acts are ultra vires, and incapable of ratification.

CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS—ESTOPPEL.—A private corporation, by mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers, cannot create an estoppel.

CORPORATIONS—REPRESENTATION OF OFFICER AS REPRESENTATION OF CORPORATION.—Representations of an officer in a corporation, made in his own interests and against the interests of the corporation, cannot be treated by the person to whom made as being the representations of the corporation.

CORPORATIONS—PLEDGE OF CORPORATE PROPERTY FOR OFFICER'S DEBT.—One who, with notice, receives from an officer of a corporation its notes or securities in payment of, or as security for, the personal debt of such officer, acts at his peril, and cannot hold such property as against the corporation or its assignee, if such pledge was not authorized by the corporation.

D. F. Raum and N. Ulrich, for the appellee.

W. Evans, for the appellant.

³⁴ CARTER, J. Appellant, as assignee for the benefit of creditors of Singer & Wheeler, a corporation organized under the laws of this state to engage in and carry on a wholesale
³⁵ drug business, brought his action of replevin in the Peoria circuit court against appellee to recover certain warehouse receipts for 220 barrels of whisky which had been issued to said Singer & Wheeler, and also to recover the whisky. The prop-

erty not having been obtained on the writ, a recovery was had for its value under a count in trover. On appeal the appellate court reversed the judgment, and on another trial the court, a jury having been waived, found the defendant, who is the appellee here, not guilty, and entered judgment accordingly. This judgment having been affirmed, the plaintiff on this his further appeal seeks a reversal for certain alleged errors.

It appears that the corporation, Singer & Wheeler, was in April, 1893, indebted to appellee, the bank, for \$5,000 borrowed money, and to secure the same pledged warehouse receipts issued to and owned by it for 275 barrels of whisky. In September, 1893, all of this debt was paid but \$1,000. Before the latter date Peter J. Singer, who was a director and the treasurer and general manager of Singer & Wheeler, owed appellee on his own account \$10,000 for borrowed money. The two notes, of \$5,000 each, which he had given for this money were overdue, and the officers of the bank were pressing for payment. Singer wanted more time, and told the agents of the bank that the corporation, Singer & Wheeler, owed him more than the amount of his debt, and that if it could pay him he could pay the bank, but that its financial condition was such it could not then do so. The agents of the bank suggested to him that if the corporation owed him he should take from it whisky or other of its merchandise for the debt and pledge it to the bank for his own debt. Singer replied that he could not do that, but after further conversation stated that he would see about it. Soon thereafter he came to the bank and stated that he had made an arrangement and would pledge the whisky as security for his debt, and thereupon ³⁶ took up his two notes of \$5,000 each and gave the bank his note for \$10,000, due in ninety days, with an agreement showing that he had, in addition to certain shares of stock which he owned, pledged warehouse receipts for 275 barrels of whisky. At this time these receipts were held by the bank, as before stated, as security for \$1,000 which remained unpaid of the company's note of \$5,000. They were the property of the company and had not been assigned by it but stood in its name. A few days later the company paid this balance of its note, but its officer or agent making the payment did not take up the warehouse receipts. Some time thereafter it was observed by an officer of the bank that the receipts had not been indorsed or assigned by the company, and he took them to its office and stated to the secretary, who was a son of Peter J. Singer, the manager, that the bank had

held them as security for the company's note until it was paid, but now held them as security for the note of Peter J. Singer, and that they ought to be indorsed. The secretary thereupon indorsed them in blank in the name of the company, by himself as secretary, and redelivered them to the officer of the bank. He testified on the trial that he indorsed them in order that the bank might hold them as security for his father's note. On two occasions afterward it became necessary to pay government taxes and storage charges, and the bank, at the request of the company, advanced the money—first \$2,956.90, then \$2,933.70. The secretary also at one time took up one of the receipts for five barrels of whisky and gave the bank another of the same amount for a different kind. In June the next year, 1894, Singer renewed his note for \$10,000, making it payable one day after date and with a like pledge of stock and receipts, and on the same day the company gave its own note to the bank for \$5,956.48 for the moneys advanced for taxes, etc., containing an agreement pledging as security the same warehouse receipts to the extent of ³⁷ 150 barrels of whisky. Afterward, from sales of a part of the whisky, authorized by the company, about \$9,000 was realized, from which the company's note to the bank given for taxes, etc., was paid, and upward of \$3,000 applied by the bank on the individual note of Singer. The balance now due on his note exceeds the value of what is left of the whisky. These transactions took place while both the company and Peter J. Singer were apparently solvent, and they were not at any time questioned by the company. The truth was, however, that instead of the company owing Peter J. Singer, as he represented to the bank, he was indebted to the company during all of the time mentioned more than \$30,000, and the company never set over, delivered, or transferred to him in any way, either as payment of or security for any supposed indebtedness to him, any of said warehouse receipts. It is agreed, however, that the bank had no knowledge of the falsity of his statement that the company owed him more than he owed the bank. Nor does it appear that the company, or any of its officers or agents except Peter J. Singer, had any knowledge of his representations to the bank, or that the bank had taken the receipts relying upon such representations.

Upon substantially this state of facts it was held by the circuit and appellate courts that the company, and appellant, its assignee, are estopped from asserting title to said warehouse receipts and whisky as against the bank, and from calling in

question the action of its officers in pledging them to secure the individual debt of one of them, viz., Peter J. Singer. This question of estoppel is the only one in the case, and was raised by propositions of law held or refused.

It is not claimed that the company was in any way responsible for or interested in the debt of its general manager, Peter J. Singer, to the bank, or that the pledging of its property to secure this debt was for its benefit or for any corporate purpose. Such a corporation has no ³⁸ corporate power to become the mere surety of another or to pledge its property for the payment of the debt of another in which it has no interest or for which it is in no wise responsible and for mere accommodation. Its charter is the measure of its powers, and all power not expressed or fairly to be implied is denied to it. The power to lend its credit to another or pledge its property to secure the debt of another in a matter in which it has no interest or is not for its benefit cannot, as a general rule, be implied: 7 Am. & Eng. Ency. of Law, 2d ed., 788.

It is clear that the bank knew that these warehouse receipts were the property of the company. They had been issued to the company, stood in its name until indorsed by the secretary, had been received by the bank from the company as security for its debt, and again accepted in pledge for its debt after they were pledged for Singer's debt—its debt created for moneys advanced to it by the bank to pay taxes on the same whisky. Indeed, there is no evidence that Singer, himself, ever had possession of the receipts, and it is not claimed that the bank believed, or had any sufficient reason to believe, that the receipts were the property of Singer, but only that Singer, from his own representations, had made some arrangement (the nature of which was not inquired into by the bank nor is it anywhere shown by the record) by which, because of the company's alleged indebtedness to him, he had obtained the right to pledge the receipts as security for his own debt. True, the secretary of the company afterward indorsed its name on the receipts and returned them to the bank with the understanding that they were held as security for the debt of his father; but the secretary himself had no power to make the pledge, and the bank is chargeable with knowledge of such lack of power. While no action of the directors making or authorizing the pledge was taken, still, treating it as the act of the corporation, it was ultra vires and void and incapable of ratification: National Home Bldg. ³⁹ Assn. v. Home Sav. Bank, 181 Ill. 35, 72 Am. St. Rep. 245, 54

N. E. 619. No fruits of the transaction were received by the company, and its mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers cannot give rise to an estoppel. If it be said that the company might be estopped from denying that it was indebted to Singer, and from denying that it had turned over the receipts to him to secure its alleged debt to him, thus apparently clothing him with a property interest in the receipts which he could pledge to the bank, it is sufficient to say that there was no such debt, and there was no evidence of any such debt on which the bank was authorized to rely as against the company. The company never knew of Singer's representations of the existence of such a debt, and is not, therefore, estopped from denying its existence. Singer was dealing with the bank in his own interest, and not as the officer or agent of the company. The bank could not, therefore, treat his representations so made in his own interest and against the interest of the company as the representations of the company: *Moores v. Citizens' Bank*, 111 U. S. 164, 4 Sup. Ct. Rep. 345. As said by the court of appeals of New York: "The general rule is, that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of or as security for a personal debt of such officer, does so at his own peril. Prima facie, the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation": *Wilson v. Metropolitan etc. Ry. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

In so far as the rulings of the circuit court upon propositions of law held and refused are in conflict with the principles above stated they are erroneous. The judgments of the appellate and circuit courts must therefore be reversed and the cause remanded to the circuit court for further proceedings.

A CORPORATION CANNOT RATIFY ULTRA VIRES CONTRACTS: *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, 20 S. W. 427. See, further, the monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 171-173, on the ratification of ultra vires contracts of corporations.

CORPORATIONS—PLEDGE OF PROPERTY BY OFFICER.—One who receives from an officer of a corporation its notes or securities in payment of or as security for the personal debt of such officer does so at his peril: *Wilson v. Metropolitan etc. Ry. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384. If stock of a corporation is issued fraudulently by one of its officers as security for his private debt, the corporation is not estopped, as against the creditor of the officer, to deny the validity of the stock: *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109.

HUDSON v. PEOPLE.

[188 Ill. 103, 58 N. E. 964.]

TAXATION—SPECIAL ASSESSMENTS—EFFECT OF PAYMENT.—A special assessment is a charge upon the specific land benefited, and not against the owner thereof. The payment of such assessment, even through mistake and by one having no interest in the land, discharges both the land and the owner from further liability thereon.

TAXATION—SPECIAL ASSESSMENT—EFFECT OF PAYMENT.—If payment of a special assessment is voluntarily made to the collector, even by one who has no interest in the land, the collector has no power to hear evidence and decide whether the assessment was paid deliberately and with a full knowledge of the facts, or under some mistake or misapprehension.

TAXATION—SPECIAL ASSESSMENTS—RESTORATION AFTER PAYMENT.—If a special assessment has been voluntarily paid, even through mistake, by one who has no interest in the land, and such payment has been received by the county officers, the assessment is discharged by the payment, and it cannot be revived or restored and the land rendered subject to sale by the act of the county officers in refunding the money paid, canceling the entry of payment, and destroying the receipt therefor. Such payment voluntarily made cannot be recovered.

Childs & Hudson, for the appellant.

M. Slusser and C. L. Ruth, for the appellee.

104 HAND, J. This is an application for judgment for sale by James McKee, treasurer and ex officio collector of Du Page county, for the nonpayment of the second and third installments of special assessment No. 42, levied by the village of Hinsdale on the sixth day of August, 1895, against the west half of lot 5, in block 1, in Robbins' Park addition to Hinsdale. Objections were filed by plaintiff in error to the rendition of judgment against said premises, of which he was the owner, on the ground that said special assessment had been paid and satisfied.

At the time said assessment was spread, the plaintiff in error, Charles H. Hudson, was the owner of the west half of said lot 5, and George B. Robbins was the owner of the east half of said lot 5. In making the assessment-roll the commissioners appointed by the county court assessed the east half of said lot 5 in the name of plaintiff in error, Charles H. Hudson, and the west half of said lot 5 in the name of George B. Robbins. Shortly after the assessment was confirmed Robbins paid the entire assessment upon the west half of said lot 5 to the collector of the village of Hinsdale, and such special assessment was marked "Paid.—Geo. B. Robbins.—March 10, 1896," on the warrant

for the collection of said assessment No. 42. Some time thereafter Robbins made a demand upon the village of Hinsdale that it refund to him the money so paid by him in satisfaction of the assessment upon the west half of lot 5. In compliance with such demand, the village of Hinsdale repaid to Robbins the amount of money paid to its collector in satisfaction of said assessment, and by resolution declared the indorsement made by the village collector on warrant No. 42, showing the payment of said assessment to be void, and directed its village collector to proceed to collect again said assessment. The village collector then drew red lines through the indorsement showing payment ¹⁰⁵ of said assessment, and reported the same as delinquent to the county treasurer of Du Page county.

A special assessment is a charge upon the specific land benefited, and not against the owner thereof: *Dempster v. People*, 158 Ill. 36, 41 N. E. 1022; and the payment of such assessment, even though by mistake, discharges both the land and the owner from further liability thereon: *Morrison v. Kelly*, 22 Ill. 609, 74 Am. Dec. 169; *Osburn v. Searles*, 156 Ill. 88, 40 N. E. 452; *Mason v. Chicago*, 48 Ill. 420. And this is so whether payment be made by the owner or one having no interest in the land: *Iowa R. R. Land Co. v. Guthrie*, 53 Iowa, 383, 5 N. W. 516. It is not for the collector to hear evidence and decide whether the assessment was paid deliberately and with a full knowledge of all the facts, or under some mistake or misapprehension: *Mason v. Chicago*, 48 Ill. 420. In the case of *Iowa R. R. Land Co. v. Guthrie*, 53 Iowa, 383, 386, 5 N. W. 522, the court say: "Payment of taxes defeats the right and power to sell the lands taxed: *Morris v. County of Sioux*, 42 Iowa, 416. This is so whether payment be made by the owner or one having no interest in the land. A mere stranger has not the right to pay taxes, but if payment be made by such a one and received by the county treasurer, the state or county, or their officers, cannot afterward question the payment. These officers are not clothed with power to determine questions of ownership of and interest in lands and the rights of parties thereto. Their powers and duties are wholly ministerial."

In *Mason v. Chicago*, 48 Ill. 420, after a special assessment was levied the owner sold the property. Without his knowledge and subsequent to the sale, his agent paid the assessment and it was so entered on the collector's books. He afterward claimed that the payment had been made through mistake. The collector refunded to him the money, canceled the entry of the payment on his books, and destroyed the receipt he had given, and

claimed the assessment to be delinquent and unpaid. On ¹⁰⁶ page 421 we say: "The law has conferred upon the collector no power to relieve parties from the effect of their inattention or mistake, and to vest him with such authority would be calculated to operate with hardship, if not positive injustice, in many cases. A person having an interest in knowing that such burdens have been removed from the property would no doubt call upon the collector to ascertain whether it was removed, and finding it marked paid would naturally give himself no further concern in reference to the matter; and if the collector might make such alterations, his property might be liable to be sold and lost, by his thus being thrown off his guard by such an act of the collector. In this case, then, the assessment was discharged by the payment. Nor was it restored by the collector's refunding the money, canceling the entry of payment on his books, and destroying the receipt."

The special assessment was valid, and the payment thereof by George B. Robbins was voluntarily made and could not be recovered back by him: *Walser v. Board of Education*, 160 Ill. 272, 43 N. E. 346. Neither could he be relieved by the village from his inattention or carelessness: *Mason v. Chicago*, 48 Ill. 420.

We are of the opinion the payment of said special assessment by George B. Robbins was a satisfaction and discharge thereof; that the village did not have the power to relieve him from a payment made through inattention or mistake; that the special assessment was not restored by the village refunding the money and directing the canceling of the entry of payment on the warrant, and that the court erred in overruling the objections of plaintiff in error.

The judgment of the county court will be reversed and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

A STREET ASSESSMENT IS A CHARGE on the adjoining lots. In some states, however, it is made a personal liability against the owner of the property benefited as well as a lien thereon: See the monographic note to *Richards v. Commissioners*, 42 Am. St. Rep. 659-661. In *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494, it is held that a statute attempting to authorize personal judgments against property owners on special assessments for local improvements is unconstitutional.

GLOBE MUTUAL LIFE INSURANCE ASSOCIATION v. WAGNER.

[188 Ill. 133, 58 N. E. 970.]

INSURANCE—LIFE—UNCONSCIOUS MISREPRESENTATIONS.—In the absence of explicit, unequivocal stipulations, requiring such an interpretation, it cannot be inferred that the insured took, or the insurer issued, a life insurance policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not.

INSURANCE—LIFE—REPRESENTATIONS NOT WARRANTY.—A statement in a medical examination by an applicant for life insurance that none of his brothers are dead is a representation and not a warranty, and if proved to be false, does not vitiate the policy, in the absence of proof of fraud or intentional misstatement on the part of the insured.

Hoyne, O'Connor & Hoyne, for the appellant.

F. T. Colby, for the appellee.

¹³⁶ **WILKIN, J.** The chief ground urged by appellant for a reversal of the judgment of the appellate court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and answer appear: "Q. How many brothers dead? A. None." The medical examination is certified to by the medical examiner, as follows:

"I certify that I have, this seventh day of October, 1895, made a personal examination of the above-named person (Richard Wagner), and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence.

"**M. J. McKENNA, M. D.**"

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the application on the other side hereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract

of insurance is issued it shall not be binding on the company unless, upon its date and delivery, I shall be in sound health." On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and ¹³⁷ over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefor, make the agreement as to agency, and all other agreements and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that whether he knew of it or not, the statement that none of his brothers were dead is a warranty, and, being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not: *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466. Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guarantee absolutely that none of his brothers were dead would be unreasonable, in the absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or a part of his relations, and to hold him to absolutely guarantee that they were living, in order that he might obtain insurance, would sometimes be to require an impossibility, and would be almost absurd.

¹³⁸ What is said in *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. Rep. 466, is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above

are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense, the word 'true' is often used as a synonym of honest; sincere; not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant as a condition precedent to any binding contract was, that he would observe the utmost good faith toward it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed.

LIFE INSURANCE—REPRESENTATION OR WARRANTY.—Statements by an applicant for life insurance are not to be regarded as warranties, unless the policy upon its face plainly declares that they shall be treated as such: *Supreme Council v. Brashears*, 89 Md. 624, 73 Am. St. Rep. 244, 43 Atl. 866. A misrepresentation or untrue statement in an application, if made in good faith, does not avoid the policy, unless it relates to some matter material to the risk: *March v. Metropolitan Life Ins. Co.*, 186 Pa. St. 629, 65 Am. St. Rep. 887, 40 Atl. 1100. Courts favor a construction which makes a statement of the insured a representation rather than a warranty: *Schwarzbach v. Ohio Valley etc. Union*, 25 W. Va. 622, 52 Am. Rep. 227. Though a statement is declared to be a warranty, it will not be given effect as such if qualified by other stipulations which show that the parties did not so regard it: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758.

GERMAN INSURANCE COMPANY v. BARTLETT.

[188 Ill. 165, 58 N. E. 1075.]

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—DECLARATIONS AS EVIDENCE.—In an action to set aside a conveyance of real estate from husband to wife as in fraud of his creditors, his declarations, oral and written, made before the indebtedness was incurred, that he had used his wife's money in purchasing the property conveyed, and that he held the title thereto in trust for her, are admissible in evidence in her favor, when he is dead, and there is no motive for falsifying the facts.

HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR.—A husband has a right to prefer his wife to his other creditors, provided the preference is based upon a valuable consideration and is made in good faith.

HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR—ESTOPPEL AGAINST WIFE.—A wife who secures the legal title to property, of which she is the equitable owner, before creditors of her husband reduce their claims to judgment, is not estopped to assert title against them by reason of her not recording a declaration of trust as soon as she received it from her husband, and not recording her deed from her husband as soon as she received it, when it does not appear that she, in any way, misled such creditors, or withheld such instruments from record by reason of any agreement with her husband.

Action to set aside as fraudulent a deed from a husband to his wife executed January 16, 1896, recorded February 10, 1896, conveying the property described in a declaration of trust made by such husband August 5, 1893, reciting that he had received the sum of seven thousand five hundred dollars from the sale of a homestead belonging solely to her, and that he had received the additional sum of five thousand dollars, as the proceeds of a policy of insurance belonging solely to her, and then reciting that "the said two sums of seventy-five hundred dollars and five thousand dollars having been paid by my said wife, or for her account, to me upon the distinct understanding and agreement made between us that I should hold said money and invest the same in another homestead for her and for her own separate use and behoof, and that whenever I should take title to any premises so to be purchased and improved out of or from said money, it should and would be, and would be and become and belong, to said Isabella J. Bartlett for her own separate use and behoof, her heirs and assigns forever, and if such title should be taken in my name I would hold the same in trust for her.

"And I do hereby declare and state that I invested the said sum of twelve thousand five hundred dollars (\$12,500) so re-

ceived by me from my said wife, in and took title to the premises known as lots numbered one (1), two (2), thirteen (13), and fourteen (14) in block 2, in Turner's addition to the original town (now city) of Freeport, county of Stephenson and state of Illinois, in my individual name. And I further declare and state that I now hold the title thereto and the improvements thereon in my individual name, solely and only as trustee, for the sole use and benefit of my said wife, Isabella J. Bartlett, her heirs and assigns forever, and not otherwise.

"In testimony whereof I have hereunto set my hand and seal this fifth day of August, eighteen hundred and ninety-three.

"FREDERIC BARTLETT. [Seal]"

The husband made oral declarations similar to those contained in the above declaration of trust to one G. C. Fry, prior to its execution. Judgment for the defendants and the plaintiffs appealed.

J. H. Steames, for the appellants.

M. Stoskopf and W. Lathrop, for the appellees.

¹⁷² HAND, J. 1. Are the oral statements and written declarations made by Frederic Bartlett, mentioned in the statement of facts which precedes this opinion, competent evidence against the complainants, as tending to show that Isabella J. Bartlett was the bona fide owner of said homestead at the time of her death? We are of the opinion they are, and that they established, in connection with the other facts proven in this case, an existing indebtedness from Frederic Bartlett to Isabella J. Bartlett, and an intention that the same should be paid. They were made some months before the indebtedness to either the insurance company or the bank was contracted and without reference thereto, and could not, therefore, have ¹⁷³ been made for the purpose of defrauding the complainants or either of them. The payment of such indebtedness was a good and valuable consideration for the transfer of said homestead from Frederic Bartlett to Isabella J. Bartlett, from whom Isabella H. takes title.

The ground upon which such evidence is received is thus stated by Mr. Greenleaf: "Declarations of the other class, of which we are now to speak, are secondary evidence, and are received only in consequence of the death of the person making them. This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact

declared or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased, that he possessed competent knowledge of the facts or that it was his duty to know them, and that the declarations were at variance with his interest. When these circumstances concur, the evidence is received, leaving its weight and value to be determined by other considerations": 1 Greenleaf on Evidence, sec. 147.

In the case of *County of Mahaska v. Ingalls*, 16 Iowa, 81, Judge Dillon, after an exhaustive review of the English and American authorities, reaches the conclusion that verbal declarations may be received in an action between third parties when accompanied by the following prerequisites: 1. The declarant must be dead; 2. The declaration must have been against the pecuniary interest of the declarant at the time it was made; 3. The declaration must be of a fact in relation to a matter concerning which the declarant was immediately and personally cognizable; and 4. The court should be satisfied that the declarant had no probable motive to falsify the fact declared.

In *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 20, 35 N. E. 383, 385, it is said: "We think, however, that there is a clear distinction between proof of the declarations of the grantee ¹⁷⁴ to the effect that he holds the title for another or has agreed to convey to another, and his declarations or admissions to the effect that another person's money was paid for the land. Declarations of the latter class are entitled to more weight than those of the former class, especially when they are corroborated by circumstances and attended by proof of some previous arrangement under which the money was advanced."

In *Crane v. Wright*, 46 Ill. 107, which was an action by the wife to recover back money paid on a contract for the purchase of land which had been rescinded, we held that the declaration of the deceased husband that the money paid on the purchase belonged to his wife and that he wished the contract to inure to her benefit, was admissible in evidence on her behalf.

We see no reason, in principle, why the admission of the husband acknowledging an indebtedness to the wife, when all the other prerequisites concur, should not be received against the creditors of the husband. Like all such declarations, they are not conclusive, but may be proved to be untrue either by positive or circumstantial evidence.

2. It appears from the evidence that Frederic Bartlett received the proceeds of the sale of the first homestead to Warner and the funds derived from the insurance policy; that in Au-

gust, 1893, he agreed to repay to Isabella J. Bartlett the amount thereof, for which he gave her his promissory note; that on January 16, 1896, he conveyed to her the homestead then occupied by them, which on the fifth day of August, 1893, he had acknowledged in equity belonged to her; that it did not exceed in value the amount of said indebtedness, and that the title thereto was conveyed to her before the complainants recovered their judgments. Frederic Bartlett had the right to prefer his wife to his other creditors, provided the preference was based upon a valuable consideration and was made in good faith.

¹⁷⁵ 3. Appellants contend that Isabella J. Bartlett was estopped from asserting title to said homestead as against their executions because she did not at once put the declaration of trust on record when she obtained it, in 1893, and because the deeds conveying the title to her were not recorded for a period of about thirty days after their execution. The proof fails to show that Isabella J. Bartlett in any way misled the complainants, or that said declaration of trust and deeds were withheld from record by reason of an agreement made by her with her husband. The complainants' equities are not superior to those of the wife. She succeeded in securing the title to the property, of which she was justly and equitably the owner, before they reduced their claims to judgments against her husband. She first reduced her equity to a legal basis, and, as was said in *Earl v. Earl*, 186 Ill. 370, 57 N. E. 1079, we cannot assent to the view her right and title to the homestead property should be subordinated to said judgments.

The substantial truth of the statements made by Frederic Bartlett are not affected by some apparent discrepancies which appear in the evidence. From an examination of this record we fully concur in the opinion of the appellate court "that the court below was fully warranted by the proofs in finding that the conveyance of real estate from Frederic to Isabella J. Bartlett was made in good faith and for a valuable consideration, and that the title to the same was vested in the latter in her lifetime."

As the complainants succeeded only in part, we do not think the court erred in requiring them to pay one-half of the costs.

Appellee, Isabella H. Bartlett, having failed to assign cross-errors in this court, we are not called upon to review that part of the decree and judgment which affects only the personal property.

The judgment of the appellate court will therefore be affirmed.

A HUSBAND MAY PREFER HIS WIFE to the exclusion of his other creditors: *Riley v. Vaughan*, 116 Mo. 169, 38 Am. St. Rep. 586, 22 S. W. 707; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926.

FRAUDULENT CONVEYANCE.—DECLARATIONS by a husband at the time of accepting a deed as to whose money was being paid therefor are competent evidence to show the character of his possession, in an action to set aside the deed made by him to his wife as in fraud of creditors: *McGhee v. Wells*, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529. See the note to *Horton v. Smith*, 42 Am. Dec. 631-633, on declarations of vendors to show fraud.

GILLESPIE v. PEOPLE.

[188 Ill. 176, 58 N. E. 1007.]

CONSTITUTIONAL LAW.—The terms "life," "liberty," and "property" embrace all liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property, and such rights include whatever is necessary to secure and effectuate their full enjoyment. None of these rights or liberties can be taken away except by due process of law.

CONSTITUTIONAL LAW.—RIGHTS OF LIBERTY and of property include the right to acquire property by labor, and by contract, and such right cannot be taken away except by due process of law.

CONSTITUTIONAL LAW.—RIGHT OF PROPERTY involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts, such right being subject only to civil liability for unwarranted termination.

CONSTITUTIONAL LAW.—NO AUTHORITY EXISTS TO PRONOUNCE PERFORMANCE OF INNOCENT ACTS CRIMINAL when the public health, safety, comfort, or welfare is not interfered with.

CONSTITUTIONAL LAW.—LIBERTY INCLUDES NOT ONLY RIGHTS TO LABOR, but to refuse to labor, and consequently, the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts.

CONSTITUTIONAL LAW.—LABOR CONTRACTS.—The legislature cannot prevent persons who are sui juris from laboring, or from making such lawful labor contracts as they may see fit, nor has it any power, by penal laws, to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him.

CONSTITUTIONAL LAW.—LABOR UNION LAWS.—A statute making it criminal for any employer to attempt to prevent his employé from joining labor unions, or to discharge him because of his connection with a labor union, is unconstitutional and void,

as depriving such employer of liberty and property without due process of law.

CONSTITUTIONAL LAW—LABOR UNION LAWS—SPECIAL LEGISLATION.—A statute attempting to make it criminal for an employer to discharge "labor union" employes, when he is not thus liable if he discharges "nonunion" employes, is unconstitutional as being special legislation.

CONSTITUTIONAL LAW—LABOR UNION LAWS—SPECIAL LEGISLATION.—A statute attempting to limit the power of an owner or employer as to his right to contract with, or to terminate his contract with, particular persons as a class, as "labor union" employes, is unconstitutional as special legislation.

Criminal action against C. Gillespie for violation of a statute entitled "An act to protect employes and guarantee their right to belong to labor organizations," approved June 17, 1893, in force July 1, 1893, as follows: "That it shall be unlawful for any individual or member of any firm, or agent, officer, or employe of any company or corporation to prevent, or attempt to prevent, employes from forming, joining, and belonging to any lawful labor organization, and any such individual, member, agent, officer or employe that coerces or attempts to coerce employes by discharging or threatening to discharge from their employ or the employ of any firm, company, or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one hundred dollars, or be imprisoned for not more than six months, or both, in the discretion of the court": Hurd's Ill. Stats. 1899, p. 844. Verdict and judgment against Gillespie, and he appealed.

Pennell & Lindley, for the appellant.

S. G. Wilson, state's attorney.

L. M. Kent and C. H. Beckwith, for the people.

¹⁸¹ **MAGRUDER, J.** The question, raised by the motion to quash the information, by the motion to exclude the evidence and discharge the plaintiff in error, by the refusal of instructions asked by the plaintiff in error, and by the overruling ¹⁸² of the motion in arrest of judgment, is the constitutionality of the statute of June 17, 1893, set forth in full in the statement preceding this opinion. The provisions of the constitution of this state, which the act in question is said to contravene, are: 1. Section 1 of article 2 of the bill of rights, which provides that "all men are by nature free and independent, and have certain inherent and inalienable rights; among these are

life, liberty, and the pursuit of happiness"; 2. Section 2 of article 2 of the bill of rights, which declares that "no person shall be deprived of life, liberty, or property without due process of law"; 3. Section 22 of article 4 of the state constitution, wherein the legislature is prohibited from passing any local or special law, "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever."

The provision of the constitution of the United States, with which the statute in question is said to be in conflict, is section 1 of the fourteenth amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It may be assumed that plaintiff in error attempted to do the act with which he is charged, and that it lay in his power to discharge, or attempt to discharge, Reuben Gibbons from his employment because of his connection with the "union" labor organization, which is admitted to have been a lawful labor organization. Upon this assumption, the question squarely arises whether or not the statute in question contravenes the provisions of the state and federal constitutions above quoted.

The terms, "life," "liberty," and "property," are representative terms, and intended to cover every right to which a member of the body politic is entitled under the ¹⁸³ law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away except by due process of law: 2 Story on the Constitution, 5th ed., sec. 1950.

The rights of "life," "liberty," and "property" embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454. If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law.

Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454; *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781. In the case at bar, the contract between plaintiff in error and Gibbons was not for any definite period of time, but Gibbons was employed by the day at so much per hour.

In view of what has been said, it cannot be doubted that the plaintiff in error, Charles Gillespie, had a right to terminate his contract, if he had one, with Reuben Gibbons, subject to civil liability for any termination which should be unwarranted. One citizen cannot be compelled to give employment to another citizen, nor can anyone be compelled to be employed against his will. The act of 1893, now under consideration, deprives the employer of the right to terminate his contract with his employé. The right to terminate such a contract is guaranteed by the organic law of the state. The legislature ¹⁸⁴ is forbidden to deprive the employer or employé of the exercise of that right. The legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort, or welfare is not interfered with. The statute in question says that, if a man exercises his constitutional right to terminate a contract with his employé, he shall, without a hearing, be punished as for the commission of a crime.

In passing upon the validity of a statute similar to the act of 1893, the supreme court of Missouri in the case of *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781, has well said: "The law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract, one of the essential attributes of property, indeed property itself, under preceding definitions. . . . But the fact as charged, as already seen, is not a crime, and will not be a crime, so long as constitutional guaranties and constitutional prohibitions are respected and enforced. If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such act guaranteed by the organic law, the exercise of a right of which the legislature is

forbidden to deprive him, can, by that body, be conclusively pronounced criminal. We deny the power of the legislature to do this; to brand as an offense that which the constitution designates and declares to be a right, and therefore, an innocent act, and consequently we hold that the statute which professes to exert such a power is nothing more or less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law."

Here, the employment, as has already been stated, was by the day, and, at the end of each day, there was no obligation on the part of Gillespie to furnish another ¹⁸⁵ day's work, and no obligation on the part of Gibbons to labor for Gillespie. At the time of the alleged offense, there was in fact no contract of employment; but at that time Gillespie said in substance to Gibbons: "I am not employing union men, and, if you belong to the union, you can look elsewhere for employment." This was not a crime on the part of the plaintiff in error, Gillespie. His sole offense consisted in refusing to give employment to a man who belonged to a union labor organization. In other words, he merely exercised his constitutional right of terminating a contract, or refusing to make a contract. Liberty includes not only the right to labor, but to refuse to labor, and, consequently, the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts. The legislature cannot prevent persons who are sui juris from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor; nor has it any power by penal laws to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon. Hence, we are of the opinion that this act contravenes those provisions of the state and federal constitutions, which guarantee that no person shall be deprived of life, liberty, or property without due process of law.

In addition to what has already been said, we regard this act as unconstitutional as being in violation of section 22 of article 4 of the state constitution as above quoted. The act certainly does grant to that class of laborers who belong to union labor organizations a special privilege. The employer, if he discharges a "union" man from his employment, is liable to be punished as having committed a crime. But he is not subject to punishment

if he should discharge from his employment a "nonunion" laboring man. An unwarrantable distinction ¹⁸⁶ is thus drawn between workingmen who belong to union labor organizations, and workingmen who do not belong to such organizations. That is to say, the statute does not relate to persons and things as a class, or to all workingmen, but only to those who belong to a lawful labor organization, that is to say, a labor union. "Where a statute does this, where it does not relate to persons or things as a class, but to particular persons or things of a class, it is a special, as distinguished from a general, law": *State v. Tolle*, 71 Mo. 645; *State v. Herrmann*, 75 Mo. 340. We concur in the following view of this subject expressed by the supreme court of Missouri in *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781: "Here a nontrade union man or nonlabor union man could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man he could not be discharged if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with, or to terminate a contract with, particular persons of a class, and therefore the statute which does this is a special, and not a general, law, and, therefore, violative of the constitution." Judge Cooley, in his work on Constitutional Limitations, sixth edition, pages 481-483, says: "A statute would not be constitutional . . . which should select particular individuals from a class or locality, and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

¹⁸⁷ For the reasons above stated, we are of the opinion that the statute in question is unconstitutional and void, and that the court below erred in not quashing the information and discharging the plaintiff in error.

Accordingly, the judgment of the county court of Vermilion county is reversed, and the cause is remanded to that court with directions to dismiss the prosecution.

CONSTITUTIONAL LAW.—THE RIGHT TO CONTRACT is both a liberty and a property right: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 35 N. E. 62.

CONSTITUTIONAL LAW.—THE WORD "PROPERTY," in its constitutional sense, signifies not only those tangible things of which one may be the owner, but everything he may have of an exchangeable value, including the right to acquire and dispose of property, and the right to contract: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955.

CONSTITUTIONAL LAW.—THE WORD "LIBERTY," as used in the constitution, includes the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, to make all contracts in relation thereto, and to enjoy the legitimate fruits thereof: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 53 S. W. 955.

THE POWER OF THE LEGISLATURE TO DECLARE ACTS CRIMINAL is the subject of the monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274. A statute which attempts to make it a crime for an employer to impose as a condition of employment that his employé shall withdraw from or refrain from joining any trade or labor union is unconstitutional: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781.

WILKIE v. CHICAGO.

[188 Ill. 444, 58 N. E. 1004.]

MUNICIPAL CORPORATIONS—ILLEGAL ORDINANCE—SUIT TO ENJOIN ENFORCEMENT OF.—To prevent a multiplicity of suits, persons who follow one certain occupation and whose rights and liabilities are identical, may join in one suit to restrain the enforcement of an alleged illegal ordinance requiring them to obtain a license, when each is threatened with a prosecution for non-compliance with such ordinance.

MUNICIPAL CORPORATIONS—POWER TO LICENSE OCCUPATIONS.—A city has no inherent power to license any occupation, or to exact a license fee from any person, and the power so to do must be found in its charter, and must be either expressly given, or be a necessary incident to the carrying out of the power granted.

MUNICIPAL CORPORATIONS—POWER TO LICENSE—EXERCISE OF POLICE POWER.—To justify an ordinance licensing a particular occupation as a proper exercise of the police power, it must appear that the requirement of such license tends to promote the public health, morals, safety, comfort, or welfare, or to suppress disease.

MUNICIPAL CORPORATIONS.—THE POWER TO LICENSE OCCUPATIONS resides in the legislature primarily, and it may grant the license directly, or confer such right upon municipal corporations. Having thus delegated its power, the legislature may, at any time take it back and resume the exercise of the power itself.

LICENSE OF OCCUPATIONS BY STATE.—A statute providing for the examination of the followers of a particular occupa-

tion, and for the granting of certificates to follow such occupation, which shall be valid throughout the state, precludes a city from requiring the holders of such certificates to pay an additional license imposed by ordinance. Such certificate granted under the statute is a license itself.

J. W. Burdette, for the appellants.

C. M. Walker, corporation counsel, and W. H. Fitzgerald, for the appellee.

445 CARTWRIGHT, J. William Wilkie and seventy-eight others, as complainants, filed their bill in this case in the circuit court of Cook county against the city of Chicago, appellee, alleging that they were master plumbers engaged in the business of plumbing in the said city, and praying for an injunction against the enforcement of section 1415 of the Revised Code of said city, requiring each master plumber to obtain a license and pay a fee of thirty dollars per year therefor, and section 1421 of such code, imposing a penalty of not less than fifty dollars nor more than one hundred dollars for each and every offense of performing any plumbing work without having first obtained such license. The circuit court overruled a general demurrer of the defendant to the said bill and granted the injunction asked for. The defendant was ruled to answer the amended bill within five days, and it was ordered that, in the event of failure to answer, the injunction should be made perpetual and the decree stand as a final decree in the cause. The defendant did not answer according to the terms of the order, and the injunction **446** became perpetual and the decree final. From that decree the defendant appealed. The appeal was heard in the branch appellate court for the first district, and the decree of the circuit court was reversed and the cause remanded, with a direction to dismiss the bill for want of equity. This appeal is prosecuted from that judgment of the appellate court.

The first question raised is whether the circuit court had jurisdiction, as a court of equity, over the subject matter of the bill. That jurisdiction was invoked upon the following facts averred in the bill and admitted by the demurrer: The seventy-nine complainants are master plumbers in the city of Chicago, and sue on behalf of themselves and all others similarly situated. There are in the city of Chicago nine hundred or more master plumbers, whose interests in the questions involved are identical and each of whom is liable to prosecution under the provisions which are alleged to be void. The city has made demands upon

complainants to take out licenses under said section, and threatens them with arrest if such licenses are not procured. If they continue to engage in their avocation the city will put its threat into execution and they will be arrested for violation of the ordinance. Each prosecution would involve the same right claimed by the city against each of them. The city would not be civilly liable nor held responsible for damages to complainants. The authorities of the city making arrests are not financially responsible or able to respond in damages. If the master plumbers should pay the license fee and bring suits to recover it, there would be required nine hundred or more suits to recover money illegally obtained. Complainants are threatened with arrest as often as they enter any premises for the purpose of plying their trade, and their business would thereby be practically destroyed.

The mere allegation that an ordinance is illegal will not confer jurisdiction upon a court of equity to restrain ⁴⁴⁷ its enforcement, but the averments of the bill bring this case within the rule recognized in *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907. The complainants are entitled to join in a suit in equity for the purpose of avoiding a multiplicity of suits and having the controversy settled in one hearing.

The conditions upon which the legality of the proposed exaction by the city depends, as alleged in the bill and admitted by the demurrer, are substantially as follows: The Revised Code of the city of Chicago went into effect in April, 1897. The provisions claimed to be invalid, under which the city demands that complainants take out a license and pay a fee of thirty dollars therefor, are as follows:

"Sec. 1415. Any person desiring to engage in or work at the business of plumbing in the city of Chicago as a master plumber shall first obtain a license so to do for each establishment or place of business to be maintained by him, and shall pay for such a license a fee of thirty (\$30) dollars per year, said license fee to be paid for during the month of May of each and every year."

"Sec. 1421. No person shall perform any plumbing work without having first obtained the license herein provided for, under penalty of a fine, upon conviction, of not less than fifty (\$50) dollars nor more than one hundred (\$100) dollars for each and every offense."

Shortly after said Revised Code took effect the legislature passed the following act (Laws 1897, p. 279):

"An act to provide for the licensing of plumbers and to supervise and inspect plumbing.

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That any person now or hereafter engaging in or working at the business of plumbing in cities or towns of five thousand inhabitants or more, in this state, either as a master plumber or employing plumber or as a journeyman plumber, shall first receive a certificate thereof in accordance with the provisions of this act.

⁴⁴⁸ "Sec. 2. Any person desiring to engage in or work at the business of plumbing, either as a master plumber or employing plumber, or as a journeyman plumber, shall make application to a board of examiners hereinafter provided for, and shall, at such time and place as said board may designate, be compelled to pass such examination as to his qualifications, as said board may direct; said examination may be made in whole or in part in writing, and shall be of a practical and elementary character but sufficiently strict to test the qualifications of the applicant.

"Sec. 3. That there shall be in every city, town, or village of ten thousand inhabitants or more a board of examiners of plumbers, consisting of three members, one of which shall be the chairman of the board of health, who shall be office (ex officio) chairman of said board of examiners; a second member, who shall be a master plumber, and a third member, who shall be a journeyman plumber. Said second and third members shall be appointed by the mayor and approved by the council or by the board of trustees of said town or village within three months after the passage of this act for the term of one year from the first day of May in the year of appointment, and thereafter annually before the first day of May, and shall be paid from the treasury of said city, town, or village the same as other officers in such sums as the authorities may designate.

"Sec. 4. Said board of examiners shall, as soon as may be after the appointment, meet and shall then designate the times and places for the examination of all applicants desiring to engage in, or work at, the business of plumbing, within their respective jurisdiction. Said board shall examine said applicants as to their practical knowledge of plumbing, house drainage, and plumbing ventilation, and, if satisfied of the competency of such applicants, shall thereupon issue a certificate to such applicant, authorizing him to engage in, or work at, the ⁴⁴⁹ business of plumbing, whether as master plumber, or employing plumber, or as a journeyman plumber. The fee for a

certificate for a master plumber, or employing plumber, shall be five dollars; for a journeyman plumber it shall be one dollar. Said certificate shall be valid and have force throughout the state, and all fees received for said certificates shall be paid into the treasury of the city, town or village where said certificates are issued.

"Sec. 5. Each city, town, or village in this state having a system of water supply or sewerage shall, by ordinance or by-law, within three months of the passage of this act, prescribe rules and regulations for the materials, construction, alteration, and inspection of all plumbing and sewerage placed in, or in connection with, any building in such city, town, or village; and the board of health or proper authorities shall further provide that no plumbing work shall be done, except in case of repairing leaks, without a permit being first issued therefor, upon such terms and conditions as such city, town or village shall prescribe.

"Sec. 6. All persons who are required by this act to take examinations and procure a certificate as required by this act shall apply to the board in the city where he resides or to the board nearest his place of residence.

"Sec. 7. Any person violating any provisions of this act shall be deemed guilty of a misdemeanor and be subject to a fine of not less than five dollars (\$5.00) nor exceeding fifty dollars (\$50.00) for each and every violation therefor, and his certificate may be revoked by the board of health or proper authorities of said city, town or village.

"Sec. 8. All acts and parts of acts inconsistent herewith are hereby repealed."

In pursuance of the provisions of said law, the city of Chicago, on January 31, 1898, passed an ordinance entitled, "An ordinance creating a board of examiners of plumbers and providing for the examination and certification ⁴⁵⁰ of plumbers." This ordinance follows and conforms to the provisions of said law and creates a board of examiners, who are required to examine applicants and issue certificates as provided by said law. The ordinance provides for a secretary at a salary of fifteen hundred dollars per year, and also for the payment of annual salaries of fifteen hundred dollars each to the plumbers who are members of said board. It also imposes a penalty of not less than five dollars nor more than fifty dollars upon any person violating, disobeying, neglecting, or refusing to comply with the ordinance. There is a proviso to the ordinance that a certificate

issued under it shall not entitle a master plumber or employing plumber to engage in his business in the city of Chicago until he has obtained a license under the provisions of section 1415 of the Revised Code. The mayor appointed a master plumber and journeyman plumber as members of the board of examining plumbers, and the board was organized with said members and commissioner of health and a secretary. The complainants each received a certificate as master plumber after an examination by the board of examiners and each paid into the treasury of the city a fee provided by said law. The complainants, by their bill, claim that the proviso in the ordinance that section 1415 shall remain in force, and that persons holding certificates from the examining board shall not be permitted to engage in the work or business of plumbing in the city of Chicago without an additional license and the payment of thirty dollars therefor, is null and void.

A city has no inherent power to license any occupation or to exact a license fee from any person. The power to do so must be found in its charter, and it must be either expressly given or be a necessary incident to the carrying out of a power so granted. The power must be plainly and unmistakably authorized by the legislature. In this case, the power to enact sections 1415 and 1421 is claimed by virtue of clause 66 of section 1 of article 5 of the act for the incorporation of cities and villages, which ⁴⁵¹ gives the city council power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances," and clause 78 of the same section, which authorizes the council "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." If a city council attempts to exercise the powers so conferred, it is, of course, necessary that there should be some substantial relation between the means employed and the end authorized by the charter. An ordinance passed in fulfillment of the objects embraced within the provisions in question must have some tendency to promote the public health, morals, security, comfort, and welfare, or to suppress disease. So far as this record shows, there was no connection whatever between the ordaining by the city council of sections 1415 and 1421 and the police power or the promotion of health or the suppression of disease. The bill to which the demurrer was interposed sets out the sections already quoted, and they are the only ones before us. The requirement of a license, with the exaction of a license fee, may be a proper and convenient means of regulating the busi-

ness, but if there was any provision of the ordinance, in connection with the license under section 1415, designed to promote health or suppress disease, or coming within the exercise of the police power, it does not appear. Manifestly, it does not improve the health of the public or suppress disease to collect thirty dollars from a plumber. There is no more relation between the public health and the collection of thirty dollars from a person engaged in plumbing than there would be from a person engaged in any other business or occupation which in no way affects the public health. So far as the record shows, the city has done nothing except make a demand for thirty dollars per year from each plumber, and there is not a trace of regulation for the public health or comfort or suppression of disease in the provision. As a mere exaction of money could not have the slightest tendency ⁴⁵² toward the ends contemplated by the clauses of the charter relied upon, the demurrer could not be sustained on the ground that such exaction was an exercise of the powers conferred by such clauses. The city has no power to tax the occupation of plumber, and does not claim to have such power.

If, however, the city ever had power to exact a license fee of thirty dollars for the regulation of the business of plumbing, that power was taken away by the above law, which went into force July 1, 1897. The power to regulate such a business and to grant a license therefor resides in the legislature, which may grant a license directly or confer the right upon a city. While the legislature may delegate the power to municipalities to grant a license for a particular occupation and to exact a license fee, they may, at any time, take away such power or resume the exercise of it themselves. The legislature may repeal or amend any provision of the act for the incorporation of cities and villages at their pleasure, and if the provisions of the act of 1897 are inconsistent with the power claimed by the city, they will operate as a repeal or amendment of the charter to that extent. The law in question authorizes cities to provide rules and regulations for materials, construction, alterations, or inspection of all plumbing and sewerage for the protection of the public health, but it provides for a certificate to be issued by a board of the city to a plumber, "authorizing him to engage in or work at the business of plumbing, whether as master plumber or employing plumber or as a journeyman plumber." The law further provides that "said certificate shall be valid and have force throughout the state." By this law the legislature have prescribed the test which shall enable a person to engage in the busi-

ness of plumbing, and the city, by its proviso, has prescribed another and additional test. The legislature, by the law, says he is authorized to work at his trade throughout the state if he has the required certificate. ⁴⁵³ The city of Chicago, by the proviso to the ordinance passed in pursuance of that law, says that he shall not work at his trade in that city except by paying thirty dollars additional and receiving another license. The city, as a subordinate political authority, cannot interfere with the validity or force of the license issued by its board under the law. That these provisions are inconsistent is plain. The law of 1897 controls the entire subject.

It is insisted that the term "certificate," used in the law, does not mean a license, and therefore the provisions are not inconsistent. The object of the act is to be stated in its title, and one of its purposes is there declared to be the "licensing" of plumbers. The certificate, by express terms, authorizes the recipient to engage in the business of plumbing. A certificate or paper having that effect is a license, which, in its general sense, is an authority to do something which without such authority is prohibited. Webster defines a license to be a formal permission from proper authorities to perform certain acts or carry on a certain business which without such permission would be illegal. The certificate is within that definition and is a license.

Authorities are cited in support of the undoubted rule that the same act may be an offense under a statute and also under an ordinance. But this case does not depend upon that question. The question here is whether the city of Chicago can deny a plumber a right which the statute gives him under the license issued by its examining board. Complainants hold licenses from the city of Chicago authorized by law, which constitute valid authority for doing the very act for which the city proposes to punish them. We think that the circuit court was right in overruling the demurrer.

The judgment of the appellate court is reversed and the decree of the circuit court is affirmed.

THE ENFORCEMENT OF A VOID ORDINANCE MAY BE ENJOINED in order to prevent a multiplicity of suits: *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 51 N. E. 907.

THE POWER TO LICENSE OCCUPATIONS must be plainly conferred upon a municipal corporation or it will be deemed not to exist: *Ex parte Garza*, 28 Tex. App. 381, 19 Am. St. Rep. 845, 13 S. W. 779. The right of a city to license the pursuit of a business that does not endanger the public health or safety cannot be extended or enlarged by any doubtful implication: *State v. Smith*, 67 Conn. 541, 52 Am. St. Rep. 301, 35 Atl. 506.

BECK LUMBER COMPANY v. RUPP.

[188 ILL 562, 59 N. E. 429.]

NOTICE—POSSESSION OF TENANT AS NOTICE OF LANDLORD'S TITLE.—Possession by a tenant during the period for which the title to the property is held by a third person under a secret trust to reconvey, is such notice of the title of the landlord as prevents a judgment against such third person from attaching as a lien on the property against such landlord or his grantee.

CLOUD ON TITLE—BILL TO REMOVE—WHO MAY MAINTAIN.—The owner of land in possession thereof, who has conveyed it by quitclaim deed, may maintain a bill to remove a cloud from the title, upon proof that such deed was intended as a mortgage.

CLOUD ON TITLE—LACHES IN SEEKING TO REMOVE.—The owner in possession of property after conveying it by quitclaim deed intended merely as a mortgage is not chargeable with laches in attempting to remove a cloud from his title if no attempt has been made to enforce any right under the deed constituting such cloud.

COSTS OF BILL TO REMOVE CLOUD ON TITLE.—Costs of a proceeding to remove a cloud from a title resulting in a judgment for plaintiff are properly decreed against the defendant, if he refuses to release the lien of his judgment constituting such cloud, upon demand made before commencement of the proceeding to remove such cloud.

Young, Markeel, Bradley & Frank, for the appellants.

N. M. Jones, for the appellee.

565 **CARTWRIGHT, J.** On April 18, 1891, Lesser Franklin filed his bill in the superior court of Cook county against the A. R. Beck Lumber Company, one of the appellants, seeking to remove a judgment in favor of said company against Mary B. Blythe as a cloud upon his title to lots 37 and 38, block 8, in Franklin Park, in said county. It is not necessary to state in detail the contents of said bill or the numerous amendments to it, for the reason that it finally came to naught. It may be said, in brief, that the next seven years were occupied with occasional general demurrers to the bill, followed by amendments to it, and during this time, on December 2, 1897, a supplemental bill was filed, in which Franklin alleged that the premises had been sold to A. R. Beck, the other appellant, on an execution issued on said judgment, and made A. R. Beck defendant, and asked to have the levy, sale, and deed set aside. This supplemental bill was demurred to and was amended, and finally, in 1898, a point was reached where an answer was required. Beck and the lumber company filed their answers, and then the practice of amending the bill was resumed. It appeared that soon after filing the

bill Franklin sold the premises, July 2, 1891, to the appellees, Mary Rupp and Charles C. T. Rupp, ⁵⁶⁶ who went into possession of the premises and had been in possession ever since. They were made defendants by amendment, and also Mary B. Blythe, the judgment debtor, and David A. Blythe, her husband. Mary Rupp and Charles C. T. Rupp answered the amended supplemental bill in its final form, admitting all its material allegations and alleging that the prosecution of the suit by Franklin would inure to their benefit. The cause came to a hearing, and in March, 1900, the court found that the complainant, Franklin, had no interest in the premises entitling him to maintain the suit, and that the bill should be dismissed for want of equity. Thereupon said Mary Rupp and Charles C. T. Rupp, the defendants, who owned the premises and were in possession, entered their motion to be substituted as complainants in place of Franklin and to make him a defendant, and to file a supplemental bill. Leave was granted and the supplemental bill was filed. Franklin, taking his place on the other side of the case as a defendant, answered, admitting all the material allegations of the supplemental bill. Appellants, the lumber company and A. R. Beck, also answered and the case again came on for hearing, when the court entered a decree setting aside the levy, sale, certificate, and deed, and enjoining the appellants from bringing any action of ejectment or other proceeding at law to obtain possession. From that decree this appeal was taken.

The averments of the supplemental bill of appellees were proved at the hearing, and were in substance as follows: The A. R. Beck Lumber Company recovered a judgment against Mary B. Blythe and David A. Blythe in the superior court of Cook county on May 19, 1886, for five hundred and seventy-five dollars. Execution was issued on the judgment April 18, 1887, and was returned no part satisfied. On January 20, 1891, Lesser Franklin was the owner of the lots in question and had completed a dwelling-house thereon. He wanted to borrow two thousand dollars by mortgaging the property, ⁵⁶⁷ and to avoid making the notes and trust deed himself he proposed to David A. Blythe, who was in his employ, that he would convey to Blythe and Blythe should make them. Blythe said there were judgments against him, and suggested a conveyance to his wife, Mary B. Blythe. Accordingly, Franklin and wife conveyed the premises by warranty deed to said Mary B. Blythe for the purpose of having her negotiate the loan and sign the notes and trust deed. There was no other consideration for the transfer, and she was

to reconvey on request. She executed the trust deed with her husband, and it was dated January 1, 1891, and recorded January 20, 1891. Franklin did not know of the judgment when he made the deed to her. She gave an order to pay the money borrowed to Franklin, and, together with her husband, quitclaimed the premises back to Franklin by a deed dated January 21, 1891, and recorded April 18, 1891. When the abstract was brought down the judgment appeared, and on the same day that Franklin filed the quitclaim deed for record he also filed his original bill to remove the judgment as a cloud upon his title. On July 2, 1891, the complainants, Mary Rupp and Charles C. T. Rupp, purchased the property from Franklin and he conveyed it to them by a warranty deed, subject to the encumbrance of two thousand dollars made by Mary B. Blythe while she held the title. They also made a trust deed to William H. Ruby to secure part of the purchase price due to Franklin, and also made and delivered to Franklin a quitclaim deed as additional security for the balance of the purchase price. They went into possession of the property at once, and have remained in possession. On March 16, 1893, the lumber company caused an alias execution to be issued on its judgment, and on April 11, 1893, the sheriff sold the property to A. R. Beck, acting as trustee for the lumber company. On July 23, 1894, the sheriff made a deed of the property to Beck. Possession of the premises was never delivered to Mary B. Blythe, but during the time she held the title ⁵⁰⁸ Walter Crumb was in possession. He went into such possession about the last of November or first of December, 1890, under a verbal agreement with Franklin. The agreement was that Crumb was not to pay any rent, but to stay in the house until spring and see if he liked the place, and if the house was all right and he liked the surroundings, he was to purchase it. He stayed there and occupied the premises until the last of April, 1891, when he said the property was not satisfactory, and left it and delivered the keys to Franklin.

It appeared from the public records of Cook county that Lesser Franklin divested himself of all title to the property in question on January 22, 1891, and the title stood of record from that time until April 18, 1891, in the name of Mary B. Blythe, the judgment debtor. The judgment in favor of appellant the A. R. Beck Lumber Company was in full force and became a lien upon her property. By our statutes the rights of the parties are governed by the record title unless there was other notice of the interest of Franklin. His conveyance to Mary B. Blythe was subject to a secret trust in his favor, and he remained the

equitable owner of the premises. A purchaser of real estate and a judgment creditor having a lien stand upon the same equity, and the rights of appellants, as judgment creditors and purchasers at the sheriff's sale, are the same as would have been the rights of a purchaser from Mary B. Blythe during the time she held the title of record: *Martin v. Dryden*, 1 Gilm. 187; *Massey v. Westcott*, 40 Ill. 160; *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313, 51 N. E. 835. The only thing, aside from the record, which could operate as notice was the possession of Walter Crumb, which extended over the period from the conveyance by Franklin to Mary B. Blythe up to the filing of the bill. The only inquiry permissible is whether that possession was sufficient notice of the title of Franklin, and it has several times been held by this court that the possession of a tenant is notice of the landlord's title. In *Franz v. Orton*, 75 Ill. 100, ⁵⁶⁹ certain premises were in the possession of tenants of John Sheldon, who had conveyed the same to John J. Orton. It was held that the possession of the tenants charged a purchaser from Orton with notice of all of Sheldon's rights, whether legal or equitable. It was said that if the purchaser had applied to the tenants he could then have learned that they were in under a lease from Sheldon, and having learned that, he would only have been required to see Sheldon and have learned the claim he held on the land. In *Haworth v. Taylor*, 108 Ill. 275, 284, Taylor was in possession of land by his tenant, Johnson. It was held that such possession was notice not only of Johnson's interest in the land, but of Taylor's as well. The court said: "The inquiry upon which one would be put, in such a case, as to the occupant's right would have discovered that Johnson was but a tenant, which would have referred the inquirer further to the landlord as to his right, as it is not to be expected that a tenant would know what was the title of his landlord." Franklin had conveyed the premises to Mary B. Blythe subject to the secret trust, and remained in possession, by his tenant, after the conveyance, and some courts have held that in such a case the possession is not notice that he claims title to the premises. But the rule in this court is different. In *Smith v. Jackson*, 76 Ill. 254, Jackson had conveyed land by deed absolute on its face to his attorney, which deed was recorded and a defeasance was taken, which was not recorded. Jackson remained in possession by his tenants, and the grantee in his deed conveyed the premises. The court followed the rule that possession of a tenant was constructive notice of his lessor's title. In *Farmers' Nat. Bank v. Sperling*, 113 Ill. 273, the same rule was followed. It must be considered as settled in this

state that the possession of Crumb was notice of the title of his landlord, Franklin.

It is urged, however, that the secret trust to which the premises were subject in the hands of Mary B. Blythe ⁵⁷⁰ was in violation of the statute of frauds, requiring express trusts to be evidenced by writing. On the other hand, it is claimed that the order of Mary B. Blythe to Franklin for the money she borrowed, and her quitclaim deed to Franklin, were writings showing the trust and fulfilling the requirements of the statute. These papers do not manifest or prove the trust as required by the statute. The trust, however, was executed by Mary B. Blythe, and the question of its validity cannot be raised by appellants. The defense must be left to the party charged with the trust, and those holding under such party, and as Mary B. Blythe saw fit to execute the trust as she did, appellants cannot now insist upon it: *Chicago Dock Co. v. Kinzie*, 49 Ill. 289.

It is argued that appellees are not the proper parties to ask for the removal of the cloud. It was averred in their bill that their quitclaim deed to Franklin was merely a mortgage, and he admitted the averment. They were the real owners, and in possession, and entitled to file the bill. They were not guilty of laches, as contended, so as to bar their equitable right, for the reason that they were in the possession of the premises, and there was no attempt to enforce any right of appellants under the sheriff's deed.

It is also charged that costs should not have been decreed against the lumber company on account of the failure to prove a demand for a release before the bill was filed. It appears from the testimony of the appellant A. R. Beck that a request for a release was made, and appellants were offered fifty dollars for such release. He does not recollect the time, but says that it was about the time the abstract was brought down. We think it sufficiently appears that it was before the bill was filed. Appellants refused to release the property from the lien, and the decree for costs was not erroneous.

The decree is affirmed.

THE POSSESSION OF A TENANT IS NOTICE of his landlord's title sufficient to put one dealing with the property on inquiry: See the note to *Parker v. Conner*, 45 Am. Rep. 188.

A SUIT TO REMOVE A CLOUD FROM THE TITLE to mortgaged land may be maintained by a mortgagee in possession under a deed absolute in form though in fact a mortgage: See the monographic note to *Helden v. Helden*, 45 Am. St. Rep. 378.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

BLUE v. BEACH.

[155 Ind. 121, 56 N. E. 89.]

BOARDS OF HEALTH — CONSTITUTIONAL LAW.—A statute establishing a state board of health, in order to secure and promote the public health, and investing it with power to adopt ordinances, rules, and regulations necessary to secure such objects, is not unconstitutional as being a delegation of legislative power, since such inhibition does not extend to prevent the grant to an administrative board of the power to adopt rules or ordinances to carry out a particular purpose.

BOARDS OF HEALTH.—THE RULES AND BY-LAWS adopted by boards of health have the force and effect of a law of the legislature; but such rules must be reasonable, not in conflict with the state's organic law, or antagonistic to the general law, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon such boards.

VACCINATION OF SCHOOL CHILDREN.—Under a statute conferring power to protect the public health and to prevent the spread of contagious and infectious diseases, a local board of health may, in times of danger of a smallpox epidemic, require that no unvaccinated child be allowed to attend the public schools during the continuance of such danger; or the board may, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or not the pupils thereof refused to be vaccinated.

S. C. Stimson, H. A. Condit, R. B. Stimson, and A. M. Higgins, for the appellant.

W. L. Taylor, attorney general, W. A. Ketcham, and Merrill Moores, for the appellees.

122 JORDAN, J. Appellant, Frank D. Blue, instituted this action to enjoin the appellees, Fannie M. Beach and Orville E. Connor, the former being a teacher and the latter superintendent

of a graded public school in the city of Terre Haute, from excluding his son, Kleo Blue, from attending said school.

The complaint, inter alia, discloses that appellant, plaintiff below, is a resident taxpayer of the city of Terre Haute, Vigo county, Indiana, and is the father of said Kleo Blue, and that the latter is a well and healthy child, between the ages of six and twenty-one years, unmarried, residing with his father in the school district wherein the school of which appellees are in charge is situated. The complaint further charges that the defendants have excluded said Kleo from ¹²² the said public school, and are threatening to prevent his further attendance as a pupil therein.

Appellees filed an answer in three paragraphs, the first being a general denial, which subsequently was withdrawn. By the second paragraph they sought to justify the act of which appellant complained, upon the facts therein alleged and set forth, that there was an exposure to and danger of an epidemic of the disease of smallpox within the limits of the city of Terre Haute, and that the board of health of the state of Indiana had, in 1891, in pursuance to law, made, adopted, and published a certain rule or by-law, numbered 11, and, further, that the legally organized and constituted board of health of said city had made and adopted a certain order. The latter, together with the above-mentioned rule of the state board of health, is incorporated in and made a part of the answer.

It is then further alleged that, in pursuance to and in accordance with said order of the local board of health, the secretary thereof had notified and directed the board of school trustees of said city, together with the superintendent of its public schools, not to allow or permit any person whatever to attend such schools unless he or she had been vaccinated. In pursuance of said order of the board of health and the notice given by said health officer, said superintendent of schools directed appellees not to allow or permit any person whatever to attend the public school mentioned in the complaint unless such person had been vaccinated. In pursuance of such order and directions, appellees notified appellant, and also notified his son, Kleo Blue, that, unless the latter was vaccinated, he would not be permitted to attend said school as a pupil. Appellant failed and refused to have his son vaccinated, and the son also refused to be vaccinated; and, by reason of the order and directions aforesaid, it is alleged that appellees refused to permit him to attend said school.

The third paragraph of the answer is substantially the ¹²³ same as the second except that it sets out and incorporates therein an ordinance of the city of Terre Haute, adopted in 1881, whereby the board of health of said city was created, and invested with certain specified powers. Rule 11 of the state board of health, in force at and prior to the time of the order made by the local health board, and made a part of the answer, is as follows: "In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health, within whose jurisdiction such exposure shall have occurred, or danger of such an epidemic ensuing, to compel a vaccination or revaccination of all exposed persons. All vaccinations must be made with non-humanized virus. The only exception to this rule that is recognized by this board is in the event that smallpox is prevalent in epidemic form, and the health officer should certify to the impossibility of obtaining such virus in sufficient quantity, and also as to the purity of the humanized virus to be used in lieu of the bovine virus."

The order made by the local board of health, and made a part of the answer, is as follows: "Whereas, there has been and is an exposure to and a danger of an epidemic of smallpox within the city limits of the city of Terre Haute, Indiana; and whereas, vaccination is the only preventive of the disease of smallpox, and the only preventive of the same becoming an epidemic; and whereas, it is dangerous to allow and permit persons to attend the public schools within the limits of said city without being vaccinated; therefore, be it adjudged, decreed, and ordered, that there has been and is an exposure to and danger of an epidemic of smallpox within the limits of said city of Terre Haute, and that it is dangerous and would cause an exposure to and an epidemic of smallpox in said city to allow and permit persons to attend public schools within said city without being vaccinated, therefore no persons shall be allowed or permitted to attend any public school within the limits of said ¹²⁴ city without first being vaccinated according to law; and be it further ordered that the secretary of this board notify the board of school trustees and the superintendent of the public schools of this order and judgment."

The ordinance, pertaining to the board of health, adopted by the common council of the city of Terre Haute in December, 1881, which, as previously stated, was made a part of the third paragraph of the answer, among other things, provides as follows: "The board of health, hereby established, shall have gen-

eral supervision of the sanitary condition of the city, and is hereby invested with power to establish and enforce such rules and regulations as they may deem necessary to promote, preserve, and secure the health of the city, and to prevent the introduction and spreading of contagious, infectious, or pestilential diseases."

A demurrer was overruled to each paragraph of the answer, and plaintiff replied in seven paragraphs, the first of which is a general denial. The second paragraph of the reply set out several rules adopted by the state board of health. The fourth alleged that the local board of health, in addition to the order mentioned in the answer, had, by another rule, excepted all children from said order who presented a certificate from a physician to the effect that they were in feeble health, or were subject to scrofulous or other blood diseases. The sixth paragraph merely averred that a local board of health had been organized under an ordinance adopted by the city of Terre Haute by virtue of the provisions of the general law of the state of Indiana.

By the third paragraph of reply it was sought to show that, at the time plaintiff's son was excluded from the school in question, the danger of an epidemic of smallpox in the city of Terre Haute had passed away. By the fifth paragraph it is averred that there had been no exposure to smallpox in the city of Terre Haute, and that but one case had been reported as existing in the state, which was at ¹²⁵ the city of Muncie. By the seventh paragraph plaintiff alleged and sought to show that vaccination in all cases produced a loathsome constitutional disease which poisoned the blood of the patient, and frequently resulted in death, and that vaccination was not a preventive of smallpox.

A demurrer was sustained to the second, fourth, and sixth paragraphs of the reply, and overruled as to the third, fifth, and seventh. Upon the issues joined, there was a trial by the court which resulted in a judgment in favor of appellees.

The evidence is not in the record, and appellant seeks a reversal of the judgment below upon the ruling of the court in holding the answer sufficient upon demurrer, and in sustaining the demurrer to the second, fourth, and sixth paragraphs of reply.

The contention of appellant's learned counsel is that each paragraph of the answer is bad, and that the facts and matters therein disclosed will not justify the appellees in excluding appellant's son from the public schools. Their insistence may be said to embrace the following propositions: 1. The exclusion of a pupil from the public schools of this state who is "well and

healthy," as the complaint discloses was the condition of Kleo Blue, and where there has been no exposure to the infection of smallpox, cannot be sustained merely because such pupil refuses to be vaccinated; 2. The right of appellant's son, under the facts shown by the complaint, to attend the public school in question is guaranteed by the constitution, and the qualifications necessary to the exercise of this privilege are prescribed by statute, and, as there is no statute providing that vaccination of a pupil shall become a condition precedent to this privilege, hence it is contended that the order made by the local board of health was without authority of law; 3. It is further insisted that rules or by-laws adopted by the state board and local boards of health do not have ¹²⁶ the force of laws within their respective jurisdiction, and that the power of the state board to adopt a by-law, or rule, of the nature of rule 11 is legislative; therefore, under article 4, section 1, of the state constitution, whereby all legislative authority is lodged in the general assembly, the power to make such rules cannot be delegated by it to boards of health.

Appellant, in the course of his argument, strenuously insists that vaccination is in no manner a preventive of smallpox, and that its failure in this respect is, as he contends, now conceded by many eminent medical authorities. In the objections which he urges against vaccination he, to an extent, at least, proceeds upon the assumption that the person who is subjected thereto will thereby have his system so poisoned by the vaccine virus as to result in his permanent injury. It is true that bad results may, and possibly do, follow from the use of impure virus, or when the system of the patient is itself in a diseased condition, but that such are the results in all cases where pure virus is used, and proper care and skill are exercised, is certainly nothing more than mere assumption. With equal force might it be asserted that, in all cases of the amputation of a limb, by a skillful and experienced surgeon, the death of the patient will necessarily follow as a result of the operation. We may say, however, in answer to the contention of appellant upon this feature of the case, that our decision herein does not in any manner, under the circumstances, depend upon the proposition that vaccination is a preventive of smallpox.

In addition to the arguments advanced by appellant, we have been fully supplied, during the pendency of this appeal, with many circulars and other documents denying the efficacy of vaccination. With the wisdom or policy of vaccination, or as to whether it is or is not a preventive of the disease of smallpox,

courts, in the decision of cases like the one at bar, have no concern. It is a question, it is true, ¹²⁷ about which eminent medical men differ, a large majority of whom, however, affirm that it serves as a preventive of, or a protection against, this dread scourge, which Macaulay denominated "the most terrible of all ministers of death." The question is one which the legislature or boards of health, in the exercise of the powers conferred upon them, must in the first instance determine, as the law affords no means for the question to be subjected to a judicial inquiry or determination. Consequently, in our holding in this appeal, it cannot be said that we affirm the arguments of those who believe in the efficacy of vaccination, or that we deny the arguments of those who assert that it is a failure and an outrage upon personal liberty.

With this statement we pass to the consideration of the real question involved. There is no express statute in this state making vaccination compulsory, nor imposing it as a condition upon the privilege of children attending our public schools, and, in the absence of such a law, the act of appellee in excluding Kleo Blue from the public schools in question must, under the facts, be justified, if at all, as a public emergency under the rules and order of the respective boards of health as set out in the answer.

In 1891 the legislature of this state passed a statute creating and establishing a state board of health, and investing it with certain powers: See Burns' Rev. Stats. 1894, sec. 6711 et seq. By section 5 of the original act (Burns' Rev. Stats. 1894, sec. 6715), this board is expressly authorized and empowered to adopt "rules and by-laws, subject to the provisions of this act, and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious and infectious disease." Section 6718 of Burns' Revised Statutes of 1894 provides that it shall be the duty of local boards of health to protect the public health by the removal of causes of disease when known, and in all cases to take prompt action to arrest the spread of contagious diseases, to abate and remove nuisances dangerous to the public health, and to perform ¹²⁸ such other duties as may from time to time be required of them by the state board of health, pertaining to the health of the people. By section 6719 of Burns' Revised Statutes of 1894 it is provided: "It shall be the duty of county boards of health to promulgate and enforce all rules and regulations of the state board of health, in their respective counties, which may be issued from time to time for the preservation of the public health, and for the prevention

of epidemic and contagious diseases. And the secretary of any board of health, who shall fail or refuse to promulgate and enforce such rules and regulations, and any person or persons, or the officers of any corporation who shall fail or refuse to obey such rules and regulations, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, and upon a second conviction the court or jury trying the cause may add imprisonment in the county jail, for any period not exceeding ninety days."

By section 6725 of Burns' Revised Statutes of 1894, the governor of the state is empowered to draw a warrant upon the state's treasury, for money in any sum not exceeding fifty thousand dollars, to be expended in preventing the introduction into the state, and the spread, of cholera, and other contagious and infectious diseases.

Under the general law, by which the city of Terre Haute is governed, the legislature expressly conferred upon its common council the power to establish a board of health, and to invest it with the necessary power to attain its object. This power the common council of that city seems to have exercised by establishing a board of health, under the ordinance of 1881, and investing it with authority to make and enforce such rules and regulations as the board might deem necessary "to promote, preserve, and secure the health of the city, and to prevent the introduction and spreading of contagious, infectious, or pestilential diseases."

Rule 11 of the state board of health, which appears to have been adopted and promulgated in 1891, soon after the organization of that board, provides, as we have seen, ¹²⁹ that in all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health within whose jurisdiction such exposure shall have occurred, or danger of such epidemic ensuing, to compel the vaccination or revaccination of all exposed persons. Pursuant to this rule, and in the exercise of the powers with which it was generally invested, this local board, after expressly finding that there had been and is an exposure to and danger of an epidemic of smallpox within the limits of the city of Terre Haute, made and promulgated the order in controversy, to the effect that no person be allowed to attend the public schools of that city without being vaccinated. In obedience to this order, it appears that the superintendent of the city's public schools directed appellees not to permit any person to attend the school over which they were in charge unless such person had been vaccinated.

That the rule or by-law adopted by the state board of health and the order of the local board were each intended to secure and protect the public health, by preventing the spread in its virulent form of the contagious and loathsome disease of small-pox, there certainly can be no doubt. That the preservation of the public health is one of the duties devolving upon the state, as a sovereign power, cannot be successfully controverted. In fact, among all of the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. This duty finds ample support in the police power which is inherent in the state and one which the latter cannot surrender.

In the case of *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, on page 451 (145 Indiana) of the opinion, in speaking in reference to the police power, it is said: "The police power of a state is recognized by the courts to be one of wide sweep. ¹³⁰ It is exercised by the state in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written constitution. It is not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it is evidently a judicial question": See, also, *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14.

In order to secure and promote the public health, the state creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities: *Parker and Worthington on Public Health*, sec. 79; 4 Am. & Eng. Ency. of Law, 597; *Lake Erie etc. Ry. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192.

When these boards duly adopt rules or by-laws, by virtue of legislative authority, such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the legislature, and, like an ordinance or by-law of a municipal corporation, they may be said to be in force by authority of the state: *Salem v. Eastern Ry. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Board of Health v. Heister*, 37 N. Y. 661; *Gregory v. Mayor, etc.*, 40 N. Y. 273; ¹³¹ *Polinsky v. People*, 73 N. Y. 65; *Dingley v. Boston*, 100 Mass. 544; *Swindell v. State*, 143 Ind. 153, 168, 42 N. E. 528; *People v. Justices, etc.*, 7 Hun, 214; *Parker and Worthington on Public Health*, sec. 85; 4 Am. & Eng. Ency. of Law, 2d ed., 599.

It is true that such rules and by-laws must be reasonable, and boards of health cannot enlarge or vary, by the operation of such rules, the powers conferred upon them by the legislature, and any rule or by-law which is in conflict with the state's organic law, or antagonistic to the general law of the state, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon such boards, would be invalid: *Parker and Worthington on Public Health*, sec. 86.

As a general proposition, whatever laws or regulations are necessary to protect the public health, and secure public comfort is a legislative question, and appropriate measures, intended and calculated to accomplish these ends, are not subject to judicial review. But, nevertheless, such measures or means must have some relation to the end in view, for, under the mere guise of the police power; personal rights and those pertaining to private property will not be permitted to be arbitrarily invaded by the legislative department; and consequently its determination, under such circumstances, is not final, but is open to review by the courts. If the legislature, in the interests of the public health, enacts a law, and thereby interferes with the personal rights of an individual, destroys or impairs his liberty or property, it then, under such circumstances, becomes the duty of the courts to review such legislation, and determine whether it in reality relates to and is appropriate to secure the object in view; and in such an examination the court will look to the substance of the thing involved, and will not be controlled by mere forms: *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Weil v. Ricord*, 24 N. J. Eq. 169.

It is affirmed by the authorities as a general proposition ¹³² or rule that no one has a right to do any act which will cause injury to the health of another, or which will disturb his

bodily comfort; still, this right of security to health or comfort cannot remain absolute in a state of organized society, but is sometimes required to give way to the demands of trade or other vital public interests: Tiedeman's Limitations of Police Powers, sec. 16.

It cannot be successfully asserted that the power of boards of health to adopt rules and by-laws subject to the provisions of the law by which they are created, and in harmony with other statutes in relation to the public health, in order that the "outbreak and spread of contagious and infectious diseases" may be prevented, is an improper delegation of legislative authority, and a violation of article 4, section 1, of the constitution. It is true beyond controversy that the legislative department of the state, wherein the constitution has lodged all legislative authority, will not be permitted to relieve itself of this power by the delegation thereof. It cannot confer on any body or person the power to determine what the law shall be, as that power is one which only the legislature, under our constitution, is authorized to exercise; but this constitutional inhibition cannot properly be extended so as to prevent the grant of legislative authority to some administrative board or other tribunal, to adopt rules, by-laws, or ordinances for the government of or to carry out a particular purpose. It cannot be said that every grant of power to executive or administrative boards or officials, involving the exercise of discretion and judgment, must be considered a delegation of legislative authority. While it is necessary that a law, when it comes from the law-making power, should be complete, still there are many matters relating to methods or details which may be, by the legislature, referred to some designated ministerial officer or body. All of such matters fall within the domain of the right of the legislature to authorize an administrative board or body to adopt ordinances, ¹⁸³ rules, by-laws, or regulations in aid of the successful execution of some general statutory provision: Cooley's Constitutional Limitations, 114.

The rule in respect to the delegation of legislative power is admirably stated in Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716, as follows: "Then the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which

wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore; be a subject of inquiry and determination outside of the halls of legislation."

That the power granted to administrative boards of the nature of boards of health, etc., to adopt rules, by-laws, and regulations reasonably adapted to carry out the purpose or object for which they are created, is not an improper delegation of authority within the meaning of the constitutional inhibition in controversy, is no longer an open question, and is well settled by a long line of authorities, see *Board etc. v. Spitler*, 13 Ind. 235; *Welch v. Bowen*, 103 Ind. 252, 2 N. E. 722; *Madison v. Abbott*, 118 Ind. 337, 21 N. E. 28; *Farley v. Board etc.*, 126 Ind. 468, 26 N. E. 174; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *State v. Haworth*, 122 Ind. 462, 23 N. E. 946; *Cleveland etc. Ry. Co. v. Backus*, 133 Ind. 513, 522, 33 N. E. 421, 18 L. R. Ann. 729; *State v. Chicago etc. Ry. Co.*, 38 Minn. 281, 37 N. W. 782; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; *Interstate Commerce Commission v. Cincinnati etc. Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. Rep. 896; *Woodruff v. New York etc. Ry. Co.*, 59 Conn. 63, 20 Atl. 17; *Storrs v. Pensacola etc. Ry. Co.*, 29 Fla. 617, 11 South. 226; *Atlantic Exp. Co. v. Wilmington etc. Ry. Co.*, 111 N. C. 463, 32 Am. St. Rep. 805, 16 S. E. 393; *State v. Hagood*, 30 S. C. 519, 9 S. E. 686; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495.

¹³⁴ It would seem that the power of the boards of health of this state, under the laws relating thereto to make and adopt all reasonable by-laws, rules, and regulations to carry out and effectuate the great interests of the public health confided to them by the legislature, is so well affirmed by the authorities that we may dismiss this feature of appellant's contention without further consideration. In the light of the firmly settled principles of the law to which we have referred, we may proceed, under the facts, to test thereby the acts of appellees in excluding Kleo Blue from school.

Under the ordinance of the city's common council establishing the local board of health, the latter was, as we have seen, invested with power to adopt and enforce such rules and regulations as it might deem necessary to secure, promote, and preserve the public health, and to prevent the spread of contagious and infectious diseases. By the provisions of the statute creating the state board of health, the imperative duty to protect the public health by the removal of causes of diseases when known,

and to take prompt action to arrest the spread of contagious diseases, and to perform such other duties as may from time to time be required by the state board, is expressly enjoined upon all local health boards.

It is certainly evident that the health board of the city of Terre Haute, regardless of the rule of the state board, had, under the law, ample power to protect the public health, and to prevent the spread of contagious and infectious diseases, and for such purposes had the right to adopt such appropriate and reasonable means or methods as its judgment dictated. This being true, and an emergency on the account of danger from smallpox having arisen, and the board believing, as we may assume, that the disease would spread through the public schools, and further believing that it could be prevented, or its bad effects lessened, by the means of vaccination, and thereby afford protection to ¹³⁵ the pupils of such schools and the community in general, it would certainly have the right, under the authority with which it was invested by the state, to require, during the continuance of such danger, that no unvaccinated child be allowed to attend the public school; or the board might, under the circumstances, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or not the pupils thereof refused to be vaccinated.

If vaccination was the most effective means of preventing the spread of the disease through the public schools, and this the local board seems to have determined, it then became not only the right, but the duty, of the board to require that the pupils of such schools be vaccinated as a sanitary condition imposed upon their privilege of attending the schools during the period of the threatened epidemic of smallpox. This power, as previously asserted, under the circumstances, was lodged in the local board of health irrespective of the rule of the state board. The rule or by-law of the latter merely emphasizes what was already the duty of local boards, in their respective jurisdictions, in times of danger of a smallpox epidemic, to enforce vaccination, if that was believed to be the best and most efficient method or means known of arresting or preventing the spread of the disease. That this was the belief of the state board when it adopted its by-law, and also of the local board when it made its rule or order in question, is certainly evident. It is declared in the order of the latter that "vaccination is the only preventive of the disease of smallpox."

The local board did not attempt, under its order, to compel appellant's son to be vaccinated. Under a reasonable interpretation of its order, the board simply gave him the option or choice either to be vaccinated or remain out of school until the danger of smallpox had passed. The facts alleged in the answer show that there had been an exposure ¹³⁶ in the community to smallpox, and that there was danger of an epidemic of that disease within the city of Terre Haute. Evidently then, under these circumstances, prompt action upon the part of the health authorities, in taking steps to arrest or prevent the spread of the disease, was essential. The first step taken by the board, it appears, was to prevent the spread thereof throughout the community by the children who each day assembled at the public schools from all parts of the city.

It is a well-recognized fact that our public schools in the past have been the means of spreading contagious diseases throughout an entire community. They have been the source from which diphtheria, scarlet fever, and other contagious diseases have carried distress and death into many families. Surely, there can be no substantial argument advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form part, from smallpox or other infectious diseases.

In several of our sister states, laws have been enacted expressly requiring vaccination; some requiring it, however, only as a prerequisite to the privilege of attending the public schools, while others enforce it against all persons. In the case of *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383, the supreme court of that state upheld the constitutional validity of a statute requiring that all children attending the public schools should be vaccinated. In sustaining the act, the court, in the course of its opinion, said: "The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the ¹³⁷ world, has proved it to be the best method known to the medical science to lessen the liability to infection with the disease."

In *Bissell v. Davison*, 65 Conn. 183, 32 Atl. 348, the validity of a law, authorizing school trustees to make vaccination a con-

dition upon the privilege of children attending the public schools was sustained. The court in that appeal said: "The question before us is not whether the legislature ought to have passed such a law; it is simply whether it had the power to pass it. In no proper sense can this statute be said to contravene the provisions of section 1 of the first article of our state constitution, as claimed by the plaintiff. It may operate to exclude his son from school, but if so it will be because of his failure to comply with what the legislature regards, wisely or unwisely, as a reasonable requirement, enacted in good faith to promote the public welfare."

In *Duffield v. Williamsport School Dist.*, 162 Pa. St. 476, 29 Atl. 742, appellant's minor son had been excluded from the public schools of the city of Williamsport. The expulsion, it appears, was under the authority of an ordinance adopted by the city which provided that "no pupil shall attend the schools of this city except they be vaccinated, or furnish a certificate from a physician that such vaccination has been performed." The school board in that case was notified by the board of health of an epidemic of smallpox prevailing in near-by cities and towns. Upon considering the communication from the board of health, and from the general alarm arising from a case of smallpox in that city, the school board adopted a resolution providing that no pupil should attend the public schools unless he had been vaccinated. The power to exclude appellant's son, under the circumstances in that case, was upheld. The court, in passing upon the question there involved, said: "It should be borne in mind that there is no effort to compel vaccination. The ¹³⁸ school board do not claim that they can compel the plaintiff to vaccinate his son. They claim only the right to exclude from the schools those who do not comply with such regulations of the city and the board of directors as have been thought necessary to preserve the public health. It would not be doubted that the directors would have the right to close the schools temporarily during the prevalence of any serious disease of an infectious or contagious character. This would be a refusal of admission to all the children of the district. They might limit the exclusion to children from infected neighborhoods, or families in which one or more of the members was suffering from the disease. For the same reason they may exclude such children as decline to comply with the requirements looking to prevention of the spread of contagion, provided these requirements are not positively unreasonable in their character."

In *In re Rebenack*, 62 Mo. App. 8, the St. Louis board of public schools ordered that all unvaccinated children should be excluded from the public schools of that city. In that case, the charter law, under which the board of public schools was created, provided that the president and directors thereof should have the power "to make all rules, ordinances, and statutes proper for the government and management of such schools and property, so that the same shall not be inconsistent with the laws of the land." The court in that case held that the school board had the right to require the vaccination of children in attendance at school, and to exclude those therefrom who refused to comply with the order.

In *Morris v. Columbus*, 102 Ga. 792, 66 Am. St. Rep. 243, 30 S. E. 850, the supreme court of that state held that the legislature, in the exercise of the police power, may confer upon municipal corporations the authority to make and enforce ordinances requiring all persons, who may be within the limits of such corporations, to submit to vaccination whenever an epidemic of smallpox is existing, or may ¹³⁹ be reasonably apprehended: See, also, *In re Walters*, 32 N. Y. Supp. 322; 84 Hun, 457.

In *Parker and Worthington on Public Health*, section 123, the rule is stated as follows: "It is sometimes provided by law that persons who may have been exposed to contagion, or who came from places believed to be infected, and particularly children attending the public schools, shall submit to vaccination, under the direction of the health authorities. This requirement is a constitutional exercise of the police power of the state, which can be sustained as a precautionary measure in the interest of the public health."

In the case of *Potts v. Breen*, 167 Ill. 67, 47 N. E. 81, 59 Am. St. Rep. 262, it is held, in the absence of an express authority from the legislature, that a rule of the state board of health, requiring the vaccination of children as a prerequisite to their attending the public schools, is unreasonable when smallpox does not exist in the community and there is no reasonable ground to apprehend its appearance. The same doctrine is reaffirmed in the case of *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850.

In the appeal of *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123, 70 N. W. 347, it is also affirmed that, in the absence of a statute authorizing compulsory vaccination, or making it a condition to the privilege of attending the public schools, a rule of the state board of health which excludes from the public

and other schools all children who do not present a certificate of vaccination is unreasonable, if, at the time of its adoption, there was no smallpox epidemic in the city, and no sufficient cause for the school authorities to believe that the disease would become prevalent in the city where the rule was sought to be enforced. The court in that case, speaking in respect to the powers of health boards, said: "It cannot be doubted but that, under appropriate general provisions of law in relation to the prevention and suppression of dangerous and contagious diseases, authority may be conferred by the legislature ¹⁴⁰ upon the state board of health or local boards to make reasonable rules and regulations for carrying into effect such general provisions, which will be valid, and may be enforced accordingly. The making of such rules and regulations is an administrative function, and not a legislative power, but there must first be some substantive provision of law to be administered and carried into effect. The true test and distinction whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the statute law, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.' The first cannot be done. To the latter, no valid objection can be made."

Neither the holding of the supreme court of Illinois nor Wisconsin, in the cases mentioned, can, under the facts, be said to militate against the conclusion which we reach in the case at bar. In fact, there is much asserted in both cases which may be said to be in harmony with our holding herein. We are not called upon, however, to decide whether a rule of either the state board or local board of health can be carried beyond the limits of the facts in this case. Appellant contends that, under the order of the local board, his son was to be permanently expelled from the public schools of the city of Terre Haute, unless he submitted to vaccination. No such unreasonable interpretation can be placed upon the rule or order in question. The order was the offspring, as we have seen, of an emergency arising from a reasonable apprehension upon the board's part that smallpox would become epidemic or prevalent in the city of Terre Haute. The rule or order could not be considered as having any force or effect beyond the existence of that emergency, and Kleo Blue, by virtue of its operation, could only be excluded from school, upon his refusal to be vaccinated, until after the danger of an

epidemic of smallpox ¹⁴¹ had disappeared. Any other construction than this would render the rule or order absurd, and place the board in the attitude of attempting to usurp authority. Such an interpretation is not authorized when a more reasonable one can be applied.

It is true, as insisted, that the privilege of children in this state to attend the public schools is guaranteed by the constitution, at least to the extent that tuition shall be free and such schools shall be equally open to all: Const., art. 8, sec. 1; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738. It is equally true, however, that they are frequently denied this privilege by reason of their refusal to submit to the proper rules of school discipline.

There is no express law in this state authorizing the expulsion from school of boisterous or disobedient pupils. That a rule to this effect, upon the part of school officials or teachers, may be enforced, no one will controvert. If expulsion can result from the violation of a rule, the object of which is to promote the morals of the scholars and the efficiency of the school in general, certainly one which is intended and calculated to promote the health of the scholars ought to be sustained.

There is nothing disclosing that appellant's son was in a condition of health which would exempt him from the requirements of this order, but, upon the contrary, it was shown that he was "well and healthy." It is said in appellant's brief that there was no investigation upon the part of the health authorities to ascertain whether his son had been exposed to smallpox. It appears, however, that there had been an exposure upon the part of the community, and it would be an absurdity, under such circumstances, to require the health officials, before taking action to prevent the spread of the disease, to investigate in order to determine the degree of exposure to which every person in the community had been subjected. The question as to what is an exposure to smallpox, so as to be affected thereby, is certainly ¹⁴² one which in the main must be left to the sound discretion or judgment of the health officers.

The supreme court of Massachusetts, in *Salem v. Eastern Ry. Co.*, 98 Mass. 431, 443, 96 Am. Dec. 650, in speaking in regard to the right of boards of health to make general orders and enforce them without unnecessary delay, said: "Their action is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed or

delayed as little as possible by the necessary observance of formalities."

The exclusion of appellant's son was not, as insisted, in the nature of a penalty, neither can the rule or order in question be considered as compelling his vaccination. It, as previously said, was only a prerequisite to his attendance at school during the period of danger.

Owing to the public importance of the questions involved in this case, we have given them much consideration, and perhaps have unnecessarily extended this opinion, but, under the facts, when tested by the firmly settled legal principles, we are constrained to uphold the order of the local board of health of the city of Terre Haute as a valid exercise of power upon its part; and we therefore conclude that appellees were justified in excluding appellant's son from the public school during the continuance of the emergency or danger from smallpox. It follows, therefore, that the court did not err in overruling the demurrer to each paragraph of the answer, nor in sustaining appellee's demurrer to the second, fourth, and sixth paragraphs of the reply.

The judgment is affirmed.

Powers Which may be Delegated to Boards of Health.*

In General, it can be said that the most extensive powers may be conferred upon boards of health, both state and local, where such powers are necessary and proper to protect the health of the community. The preservation of the public health has always been deemed a proper exercise of the police power of the state, and whatever tends to promote the health and protect the lives of the citizens of a state is within the police power. It is by virtue of this police power that it is held that the legislature may create boards of health and confer upon them whatever powers are necessary for the preservation of the general health of a community or of an entire state. Hence, in order to prevent the spread of disease, to provide healthful conditions for the public, and to abate nuisances, boards of health may be created and invested with the power necessary and appropriate for such purposes: *Hengehold v. Covington* (Ky.), 57 S. W. 495. These boards may be created by direct legislative act, and their powers conferred upon them by the legislature, or authority may be given to municipal corporations to create local boards for the purpose of protecting the public

***REFERENCES TO MONOGRAPHIC NOTES.**

- Quarantine and health laws and regulations: 47 Am. St. Rep. 533-552.
Power of municipalities and other bodies to establish quarantine: 92 Am. Dec.
76-80.
Power of boards of health to declare nuisances: 23 Am. Rep. 212, 213.

health: *Hengehold v. Covington* (Ky.), 57 S. W. 495; *People v. Board of Health*, 71 Hun, 84, 24 N. Y. Supp. 629; *Metropolitan Board of Health v. Helster*, 37 N. Y. 661; *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 96 Am. Dec. 650. Where express power is given to municipalities to abate nuisances and to establish boards of health with such power as is necessary to protect the community from diseases, there can be no doubt that boards of health may be invested with power to abate nuisances dangerous to health: *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; and, it would seem, any other powers necessary to protect the health of the community. But even where no express authority is conferred upon municipalities to abate nuisances and protect the health of the community, such powers are inherent in the municipality. They have an implied power to pass reasonable ordinances relative to such matters: *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Hengehold v. Covington* (Ky.), 57 S. W. 495; *Vionet v. First Municipality*, 4 La. Ann. 42. Such powers being an essential part of municipal government, their delegation to boards of health would seem to be as proper where they are merely implied as where they are expressly conferred upon the municipality: See *Boehm v. Mayor*, 61 Md. 259; *Hengehold v. Covington* (Ky.), 57 S. W. 495. Whatever doubt there may be as to the extent of the powers of a board of health where they are not expressly conferred, there can be no question that the legislature may invest them with the most ample authority within the locality in which they are to act: *Aaron v. Broiles*, 64 Tex. 316, 53 Am. Rep. 764; *Haverty v. Bass*, 66 Me. 71. Where the power to establish rules and regulations for securing good sanitary conditions and protecting the public is lodged in the municipal authorities, and the board of health is only given authority to enforce such rules and regulations so established, such board has no authority to itself enact legislation or establish regulations it may deem necessary for the protection of the health of the community: *Wong Wai v. Williamson*, 103 Fed. 1.

There is usually not so much question as to what powers may be delegated to boards of health, as to whether, in the exercise of those powers, the board has exceeded its authority in the manner in which they have been exercised. Conceding the general power to protect the public health, it is usually the mode of its exercise of which complaint is made: See *St. Louis v. McCoy*, 18 Mo. 238. Undoubtedly, every possible presumption should be indulged in favor of the validity of their action. And in determining this question a liberal construction is justified in view of the public good to be accomplished: *Hengehold v. Covington* (Ky.), 57 S. W. 495. Especially in the presence of a great calamity and in times of great public danger, courts will go to the greatest extent, and give the widest discretion, in reviewing regulations adopted by boards of health: *Jew Ho v. Williamson*, 103 Fed. 10. The rules, regulations, and by-laws which are adopted by such boards must, how-

ever, be reasonably adapted to secure the object in view: *Wong Wal v. Williamson*, 103 Fed. 1. They must not unreasonably interfere with the liberty, property, and business of the citizen: *Commonwealth v. Patch*, 97 Mass. 221. And whether such regulations are reasonable, impartial, and consistent with the state policy is a question for the court: *State v. Speyer*, 67 Vt. 502, 48 Am. St. Rep. 832, 32 Atl. 476. Neither must such regulations be repugnant to the constitution or laws of the state: *Commonwealth v. Patch*, 97 Mass. 221; *Jew Ho v. Williamson*, 103 Fed. 10; *Metropolitan Board of Health v. Schmades*, 10 Abb. Pr., N. S., 205; 3 Daly, 282; *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833. Rules and by-laws adopted by such boards under legislative authority have the same force and effect as legislative enactments: *Polinsky v. People*, 73 N. Y. 65; *People v. Board of Health*, 71 Hun, 84; 24 N. Y. Supp. 629.

The Abatement of Nuisances is one of the chief powers conferred upon boards of health either by the legislature or by municipal corporations: *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; *Cartwright v. Cohoes*, 39 App. Div. 69; 56 N. Y. Supp. 731; *State v. Henzler* (N. J.), 41 Atl. 228; *Commonwealth v. Yost*, 197 Pa. St. 171, 46 Atl. 845. Hence a board of health may prohibit the maintenance of privy vaults within twenty-five feet of any door or window of a residence, declaring the same to be a nuisance, and if the owner of such a vault refuses to abate the nuisance, the board may, by its health officer, enter the premises and abate the nuisance by filling the vault with earth: *Cartwright v. Cohoes*, 39 App. Div. 69; 56 N. Y. Supp. 731. A board of health is not dependent on city ordinances for the abatement of nuisances per se, but may act even in the absence of such ordinances: *State v. Henzler* (N. J.), 41 Atl. 228. And a board has power to abate a nuisance, though it becomes such only by reason of the fact that the public affected have voluntarily moved near it: *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444. The writ of injunction may be resorted to to prevent the defendant from maintaining a nuisance caused by outlets from privies and cesspools into the public gutters of a city: *Board of Health v. Cotton Mills*, 46 La. Ann. 806, 15 South. 164. And under a statute authorizing boards of health to make and enforce orders, a board may order the removal of a nuisance consisting of the discharge of sewage on the lands of the town by a city, and may enjoin the violation of such order by the city: *Bell v. Rochester*, 11 N. Y. Supp. 305; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275. Where property is in fact a nuisance and dangerous to health, a board may order its destruction if this is necessary to secure the removal of the nuisance: *Mayor v. Mulligan*, 95 Ga. 323, 51 Am. St. Rep. 86, 22 S. E. 621. But it must be clear that such destruction is necessary to accomplish the end in view. If the nuisance can be abated by a discontinuance of the use, destruction of the property will be unwarranted: *Health Department v. Dassori*, 21 App. Div. 348; 47 N. Y. Supp. 641.

It seems that in ordering the removal of a nuisance a board of health is not authorized to prescribe the particular mode for the removal, and if a mode is designated it is not binding on the property owner if there is some other method equally effective and which the owner desires to adopt: *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71. The board's powers are confined to the removal of the nuisance. If but one mode of removal can be effective, that should naturally be followed. But where this is not the case, the owner should be permitted to remove the nuisance in the mode least detrimental and offensive to himself. Thus a board of health may properly order the removal of a privy vault which it has found to be a nuisance. But it cannot, as incident to the abatement of such nuisance, order a property owner to construct water-closets and connections: *Philadelphia v. Provident Trust Co.*, 132 Pa. St. 224, 18 Atl. 1114. The nuisance, in such a case, is not the mere hole in the ground, but the contents of the privy vault; so that when the vault is cleaned and purified the cause of the nuisance is removed. And it would seem that a board has no power to assume in advance that all sinks and privies in a city, wherever located, will become nuisances, and bind the city by a contract for the removal of their contents: *Gregory v. New York*, 40 N. Y. 273. A board, however, has ample power to declare all privy vaults located in a city within twenty-five feet of any door or window of a residence to be nuisances and to prohibit their maintenance in such localities: *Cartwright v. Cohoes*, 39 App. Div. 69; 56 N. Y. Supp. 731. Where a property owner neglects or refuses to abate the nuisance, the board may, by its officers, enter and remove the cause of the nuisance, such as filling up a privy vault with earth: *Cartwright v. Cohoes*, 39 App. Div. 69; 56 N. Y. Supp. 731. And the cost of the filling up of vaults or lots which are dangerous to the public health may be recovered from the property owner: *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33. In removing a nuisance, a board of health is not restricted to the particular mode which it has previously indicated in its order requiring the nuisance to be removed: *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 96 Am. Dec. 650. Courts recognize the great importance of sustaining the action of boards of health in all lawful measures adopted to secure or promote the health of the community, and are cautious in declaring any curtailment of their authority except upon the clearest grounds: See *Gregory v. New York*, 40 N. Y. 273. But when their acts, while apparently done in the interest of the public health, yet in no material respect subserves such an end and are actually injurious to certain individuals, the courts have no hesitancy in declaring that they have exceeded their powers. Thus a board has no power to order acts to be done which will be nuisances to others. Hence, where an upper riparian owner was directed to discharge his sewerage into a stream, thus rendering the water unfit for the domestic

use of a lower riparian owner, the board making the order was deemed to have acted in excess of its powers, and an injunction would lie against the upper riparian owner by the lower: *Mann v. Willey*, 51 App. Div. 169; 64 N. Y. Supp. 589. And quarantine authorities are not authorized to maintain a pesthouse so near a schoolhouse as to constitute a nuisance destroying the usefulness of the schoolhouse: *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350, 57 S. W. 328. Similarly, a township board of health cannot erect a pesthouse upon property belonging to it in another township, where such location would be a nuisance: *Warner v. Stebbins* (Iowa), 82 N. W. 457.

Local boards of health are generally confined in their action to their territorial limits: *Board of Health v. East Orange*, 53 N. J. Eq. 498, 32 Atl. 693. Where action outside of the territorial limits of a local board is necessary, it should be taken by the state board, if one exists with power to act. And the legislature may confer power on a state board to abate a nuisance within the territorial limits of a city, whenever such nuisance has its source or origin outside of the city limits: *State v. Jersey City*, 55 N. J. Eq. 116, 35 Atl. 835. Such legislation is constitutional, and it is often very necessary, especially where the local board of health where the nuisance has its origin refuses or neglects to act. There can be no doubt that the local board of the township where the nuisance originates has ample power to abate such nuisance, though it is only hazardous to the health of individuals residing in another township: *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444. It would appear to be equally competent for the legislature to extend the power of the municipal health authorities over adjacent territory: *Harrison v. Mayor*, 1 Gill, 264. The courts will, if possible, sustain such power in a local board, where it is essential to the protection of the health of the community. Thus, in *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275, the board of health of Brighton declared that the discharge of sewage by the city of Rochester upon ground adjacent to the town of Brighton, which was carried upon and over the town lands was a nuisance, and ordered its abatement. The city of Rochester refusing to act, the local board of health commenced suit to restrain the city of Rochester from discharging such sewage over the lands of the town. The court held that it could maintain the action to prevent the violation of its order. That while it could not summarily execute its orders by going outside of the boundaries of the town, and into the city of Rochester so as to interfere with the sewers, it could enforce its orders by an action in a court of equity, and prevent the discharge of sewage upon lands of the town where it created a nuisance. While, in this case, the cause of the nuisance arose in an adjoining municipality, yet within the meaning of the statute, the city was the occupant of premises within the town of Brighton on which the nuisance existed. The

court declined to pass upon the question whether the local board would have power to act if the nuisance was merely consequential, that is, if the sewage, having been discharged and being a nuisance in the city of Rochester, affected injuriously the town of Brighton by corrupting the air. Such a case is doubtful, and would seem to be a clear case for the action of a state board of health. *Bell v. Rochester*, 11 N. Y. Supp. 305, follows the doctrine laid down in *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275.

The summary abatement of a nuisance is not the appropriation of private property to public use: *Weil v. Schultz*, 33 How. Pr. 7. Neither is it taking property without due process of law: *Board of Health v. Helster*, 37 N. Y. 661; *Coe v. Schultz*, 47 Barb. 64.

Giving Notice Before Abating Nuisance.—The general power to abate nuisances is unquestioned. The controversies which have arisen relative to the exercise of such power have related mainly to the questions whether notice to the property owner is essential before a board of health can take action, and whether the action of such board is conclusive upon the question of nuisance. There is no doubt that notice from the board to the property owner before any action is taken may be required by statute: *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320. And a failure to give the required notice will render the board's action void: *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71; *Hall v. Staples*, 166 Mass. 399, 44 N. E. 351. It is undoubtedly better practice for a board to give notice before proceeding to abate a nuisance, particularly in ordinary cases. Some of the authorities draw a distinction between cases of imminent danger, in which situation a board of health may act summarily without giving notice, and cases where the necessity for immediate action does not exist, in which case "a judgment condemning the property must be the result of a trial before a regularly authorized tribunal, in a proceeding to which the person whose rights are to be affected is a party, and in which the burden of proving the charges is upon the complainant, and full opportunity is given to the adverse party to make his defense": *Munn v. Corbin*, 8 Colo. App. 113, 44 Pac. 783; *Weil v. Ricord*, 24 N. J. Eq. 169. The necessity of giving notice before a board of health can act was tersely expressed in *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203: "It is not within the competence of legislation in this state to authorize any tribunal to render a judgment against the person or property of a citizen without notice, and an opportunity afforded him to be heard. If the charter of the city of Camden had declared that the board of health should have the power of rendering decisions similar to the present one, and under the same conditions of procedure, such provision would have been entirely nugatory. A judgment in any court, without in anywise summoning the defendant, would be void, and not merely voidable." Other decisions are to be found to the effect that notice to the person to be affected is prerequisite to any

action on the part of a board of health declaring that a nuisance exists and ordering its removal. And even if the statute conferring the power on the board of health does not require notice, it has been held that notice must nevertheless be given, so firmly is this principle imbedded in our jurisprudence: *People v. Board of Health*, 58 Hun, 595; 12 N. Y. Supp. 561; *People v. Wood*, 62 Hun, 131; 16 N. Y. Supp. 664; *Schoepflin v. Calkins*, 5 Misc. Rep. 159; 25 N. Y. Supp. 696. In *Rogers v. Barker*, 31 Barb. 447, it was held that a board of health had no power to summarily order a milldam to be destroyed as a nuisance, without allowing the owner an opportunity to be heard, and that the question whether such milldam was a nuisance should be determined by a jury. The summary abatement of nuisances was said to be confined to nuisances *per se*, and did not extend to those matters or employments whose offensive qualities depended upon the presence or absence of various extraneous facts and circumstances. It would seem that some of the courts have failed to distinguish between the question of the necessity of giving notice before a board of health can declare a thing to be a nuisance, and the question of the conclusiveness of such a declaration. The two questions are quite distinct. In the interest of the public health, boards should be given power to summarily act without notice. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. But this does not mean that their action is conclusive on the question whether a nuisance exists or not. Every person is entitled to a hearing as a matter of right, and the fact that a board of health declares anything a nuisance does not make it such. A board of health may, without notice, declare a nuisance, but such a declaration cannot be final and conclusive until after the property owner has had a hearing, and if the board orders the abatement of such alleged nuisance it acts at its peril. The distinction between the necessity of giving notice before a board of health can act and the conclusiveness of their action is very clearly pointed out in *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320, and for this reason we shall quote freely from this case. "Boards of health," says the court, "and the like boards, act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. . . . The question may be asked, How can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of

nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor, but as matter of right. . . . As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final." Further on in the opinion the court asks the question, "What, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property, if the case be one where a court of equity, under equity rules, has jurisdiction, or he may bring a common-law action against all persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and if he can show that the alleged nuisance does not in fact exist he will recover judgment, notwithstanding the ordinance of the board of health. Thus, the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners."

This view would seem to be the better one, though not supported by all the authorities, and power may be conferred upon a board of health to act summarily without notice to the party whose interests are affected. The practical working out of this distinction we have alluded to may be seen in *Belcher v. Farrar*, 8 Allen, 325, where it was held that those acting as a board of health could forbid the exercise of an offensive trade as a nuisance without first giving notice to those engaged in carrying on the same, but that such order was not conclusive on the persons affected, their rights in that case being preserved by the right of appealing from such order of the board to the courts. The declaration of the board that a nuisance exists is said to be merely an initiatory step in the administration of justice. The court points out that if the board were required to give preliminary notice to everyone affected, "it would follow necessarily that such persons would have a right to appear and object, and ask for a hearing and trial on the question whether the use of their property was hurtful or noxious, so as to fall within any of the classes contemplated by the statute. This would often lead to protracted examinations, which might occupy days or weeks. If, in the meantime, the alleged offensive and noisome trades might be carried on, great injury to health might be occasioned, and it would be impossible to prevent the evils which it was the manifest object of the statute promptly to suppress." *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 96 Am. Dec. 650, also illustrates this distinction, and the court here held that a board of

health was not required to give notice to parties interested prior to making an order to remove a nuisance, but that such order was not conclusive upon the party who caused the nuisance. This was a suit to recover for the expense incurred in removing an alleged nuisance, and while the board's action without giving notice was sustained, yet the property owner was allowed to contest the question whether any nuisance had existed at all. In sustaining the action of the board without giving notice to the property owners affected, the court very pertinently observes that the action of boards of health "is intended to be prompt and summary. They are clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health, and it is important that their proceedings should be embarrassed and delayed as little as possible by the necessary observance of formalities. Although notice and opportunity to be heard upon matters affecting private interests ought always to be given when practicable, yet the nature and object of these proceedings are such that it is deemed to be most for the general good that such notice should not be essential to the right of the board of health to act for the public safety. Delay for the purpose of giving notice, involving the necessity either of public notice or of inquiry to ascertain who are the parties whose interests will be affected, and further delay for such hearings as the parties may think necessary for the protection of their interests, might defeat all beneficial results from an attempt to exercise the powers conferred upon boards of health." In some of the cases in which it has apparently been held that the legislature cannot confer upon boards of health power to declare nuisances without notice to the persons affected, the decision was unnecessary to the proper disposition of the case. Thus in *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203, it appeared that the board of health declared certain property to be a nuisance and ordered it filled up, and the order not being complied with, the municipal authorities did the work and sued for the expense incurred. Now, it is obvious from what has been said that the declaration by the board of health that the property was a nuisance is not conclusive upon the property owner, and therefore in this suit to recover for the cost of abating the nuisance the question as to whether a nuisance actually existed or not could be litigated. Thus the property owner is protected, and has not been deprived of his property without due process of law. But it was unnecessary for the court to go further and say that the proceedings of the board were absolutely void in the absence of notice to the property owner. It was unnecessary in order to protect the property owner, and equally so to sustain the decision, for the decision would have been the same if the court had merely held that the order was not conclusive on the question of the existence of a nuisance. Of course, the view for which we are contending requires the board of health to act at its peril, and this is undoubtedly the rule. "No

other view of the law would give adequate protection to private rights," said the court in *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320. "They should not destroy property as a nuisance unless they know it to be such; and if there be doubt whether it be a nuisance or not the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do." To the same effect are *Mayor of Savannah v. Mulligan*, 95 Ga. 323, 51 Am. St. Rep. 86, 22 S. E. 621; *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353. In *Egan v. Health Department*, 20 Misc. Rep. 38, 45 N. Y. Supp. 325, it was held that a board of health could order a tenement house to be vacated, because of its unsanitary condition, without notice to the owner, and the court points out that the notion that such a board cannot take action without giving previous notice to the parties affected "rests upon the mistaken assumption that the determination of the health authorities is final and conclusive." See, further, as holding that a board of health has power to act summarily without giving notice, *Taunton v. Taylor*, 116 Mass. 254; *State v. Main*, 69 Conn. 123, 61 Am. St. Rep. 30, 37 Atl. 80; *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833.

While the rule seems not to have been so stated, it appears to be a necessary and legitimate inference from the cases cited that where the declaration by a board of health that a nuisance exists and its order requiring the removal of such nuisance are not final and conclusive as against the persons affected, and such persons' rights may be protected by a later hearing, in such case the board need not give notice to the persons affected before taking action, unless such notice is required by statute.

Conclusiveness of Board's Declaration of Nuisance.—From what has already been said it is clear that by the great weight of authority a board of health has no power to conclusively determine whether a nuisance exists or not: *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *St. Louis v. Schunckelberg*, 7 Mo. App. 536; *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833; *Underwood v. Green*, 42 N. Y. 140; *State v. Street Commrs.*, 36 N. J. L. 283; *Schuster v. Metropolitan Board of Health*, 49 Barb. 450. The fact that the legislature has conferred power on such a board to declare and abate nuisances does not increase their authority in this respect, nor make their declarations any more conclusive: *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320; *Sawyer v. State Board of Health*, 125 Mass. 182. A board of health in abating nuisances is not exercising judicial powers: *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353. Even where the statute conferring power upon the board of health provides that the action of the board shall be regarded as judicial,

this does not make the board a court whose orders are final and conclusive: *Golden v. Health Department*, 21 App. Div. 420; 47 N. Y. Supp. 623. Even if the decision of a board has been made after a hearing, it cannot conclude the property owner upon the question of nuisance: *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833; *Westchester etc. R. R. Co. v. Angevine*, 52 App. Div. 239; 65 N. Y. Supp. 376. As was pointed out in *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320, if such a determination were final, even after a hearing, "the citizen would, in many cases, hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions." The declaration by a board of health that a building was dangerous and ordering its removal was held not to be conclusive on the fact of a nuisance existing, in *Egan v. Health Department*, 20 Misc. Rep. 38, 45 N. Y. Supp. 325, and in *Golden v. Health Department*, 21 App. Div. 420, 47 N. Y. Supp. 623.

Boards of health cannot by their action make that a nuisance which is not in fact a nuisance. "It is the actual existence of a nuisance which gives them jurisdiction to act": *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320. If the nuisance in fact exists, the action of the board will be sustained. It may be for this reason that the courts have sometimes declared that the determination by health authorities that a nuisance exists is final and conclusive, if the nuisance is one per se. The conclusive character of a declaration that a nuisance exists was thus sustained in *St. Louis v. Stern*, 3 Mo. App. 48, where the board of health of St. Louis declared certain pigpens in the city to be a nuisance. The court held that a pigsty in a city being a nuisance per se, the action of the board was conclusive. We should say, however, that the more proper statement of the law in such a case would be, not that the action of the board is conclusive so as to preclude any further investigation of the subject of nuisance, but that the action of the board would be sustained because a nuisance did in fact exist. To be sure, in the case of nuisances per se, the result is precisely the same in either case, but the danger lies in the likelihood of extending the range of nuisances per se, and of upholding the conclusiveness of the board's action in cases where there may be grave doubt as to whether a nuisance exists or not. Decisions are not wanting from which it is to be inferred that the action of a board of health is conclusive on the question of nuisance. Thus in *Kennedy v. Board of Health*, 2 Pa. St. 366, the action of a health board in determining the existence of a nuisance and abating it was deemed conclusive, under a statute which empowered such boards to abate all nuisances which might have a tendency, "in their opinion," to endanger the health of the citizens. In *Green v. Mayor*, 6 Ga. 1, the prohibition by municipal authorities

of the cultivation of rice within the city limits was held to be a conclusive determination that the planting and growing of rice within the city limits was detrimental to the health of the community and a public nuisance. *Van Wormer v. Mayor*, 15 Wend. 262, is to the same effect. These decisions we do not believe can be sustained on principle, as they confer an arbitrary and dangerous power upon boards of health, unnecessary either for the protection of the public or the preservation of private rights. Summary power to act without notice, coupled with the principle that such action is not conclusive upon the persons affected, will be an adequate protection to the public health, and at the same time will sustain the board in the legitimate exercise of its powers, and preserve the property rights of the private citizen against arbitrary destruction. A board of health should have no power to conclusively determine whether a nuisance exists or not, and the better rule is that such power cannot be conferred upon such bodies by the legislature: See *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203. The rule is clearly stated by Judge Cooley in his *Constitutional Limitations*, 741, note 2: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards. The local declaration that a nuisance exists is therefore not conclusive, and the party concerned may contest the fact in the courts." And a board of health acts at its peril in removing nuisances without a trial and hearing: *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320; *Smith v. Irish*, 37 App. Div. 222; 55 N. Y. Supp. 837.

The determination by a board of health that a nuisance exists is, however, presumptively valid until questioned or assailed: *People v. Board of Health*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320. The adjudication of the board of health is *prima facie* evidence of the existence of the nuisance: *Kirkwood v. Cairns*, 44 Mo. App. 88. All presumptions favor their actions, and every intendment is indulged to sustain them: Cooley's *Constitutional Limitations*, 721, note. And while it is primarily a legislative question as to what regulations are in the interest of the public health, yet courts may review any action of a board of health which interferes with the personal rights of an individual, and determine whether the action taken really relates to, and is appropriate to secure the object in view: *Wong Wai v. Williamson*, 103 Fed. 1; principal case.

It has been held that the granting of a license by a board of health to erect a building is a conclusive determination that the building is not a nuisance: *White v. Kinney*, 157 Mass. 12, 31 N. E. 654. Thus in *Commonwealth v. Rumford Chemical Works*, 16 Gray, 231, it was said that "if the board of health acts and assigns places in which any particular trade or employment may be carried on,

such an assignment would undoubtedly legalize the occupation of any person conducting his business in that place." But it is not every case that comes within the purview of this rule, and a license to carry on a business is not, under any and all circumstances, a protection against an indictment for nuisance growing out of such business. In *Garrett v. State*, 49 N. J. L. 94, 60 Am. Rep. 592, 7 Atl. 29, it was aptly pointed out that the object of legislation creating boards of health was to prevent nuisances and to protect the public health. Large as are the powers of such boards, they are granted solely for the suppression, and not for the creation or protection, of nuisances. "The power to license," said the court, "is given as a means of exercising restraint and control over doubtful pursuits, as to those noxious in nature or becoming so by carelessness. The sole power given, or designed to be given, is to abate and suppress. Business not unlawful in itself may be brought under control by safe and proper regulations touching modes of conducting such business, to avoid offense to the public. But such boards have not been endowed with power to grant away the public right to pure and uncontaminated air."

Power to Prohibit Business and Regulate the Use of Property.—The most extensive powers may be conferred upon boards of health when necessary to protect the public health. Accordingly, it has been held proper to empower boards of health to regulate the use of property and even to prohibit the carrying on of business in a certain way or in particular places. Such power, however, is confined to sanitary and police regulations. Thus it has been held constitutional to empower a board of health to prevent the sale of adulterated milk: *Polinsky v. People*, 73 N. Y. 65; and to prohibit a trade or employment, which is attended by noisome and injurious odors, from being carried on in a city: *Taunton v. Taylor*, 116 Mass. 254; *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444. The board acts within its powers if the exercise of the trade will be hurtful to the inhabitants, or injurious to the public health, or be attended by noisome and injurious odors: *Taunton v. Taylor*, 116 Mass. 254. The legislature may empower such bodies to abate or remove all trades or manufactures that might be deemed injurious to the public health: *Board of Health v. Heister*, 37 N. Y. 661. And, as we have already seen, every presumption will be indulged in favor of the validity of their action. But they cannot, under the guise of protecting the public, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations: *Jew Ho v. Williamson*, 103 Fed. 10. Their regulations must be reasonable, and must not interfere with the liberty, property, and business of the citizen more than is necessary to secure the lawful and proper object in view: *Commonwealth v. Patch*, 97 Mass. 221. Boards of health cannot absolutely prohibit the carrying on of a lawful business not necessarily a nuisance, but which may be conducted without injury or danger to the public health,

and without public inconvenience. In their interference with the lawful business of an individual, boards are confined in their interference to such interruptions as are reasonably necessary to the abatement of any nuisance created by the particular manner of conducting it: *Well v. Ricord*, 24 N. J. Eq. 169. Hence it is held that a tannery is not per se a nuisance, and cannot be abated by a board of health unless so carried on as to be inimical to public health or safety: *State v. Street Commrs.*, 36 N. J. L. 283. And where a board of health has prohibited slaughtering on certain premises, a jury may, on appeal from such order permit the business to be carried on under such restrictions that the premises will be kept at all times neat and clean, where it appears that this can be done: *Sawyer v. State Board of Health*, 125 Mass. 182. Powers of boards of health must also be exercised subject to the provisions of the general law: *Health Department v. Rector of Trinity Church*, 145 N. Y. 32; 45 Am. St. Rep. 579, 39 N. E. 833. Hence, where the legislature has already regulated the standard of petroleum and the mode of storage, a board of health cannot impose further restrictions: *Metropolitan Board of Health v. Schmades*, 10 Abb. Pr., N. S., 205; 3 Daly, 282.

The regulation of the sanitary condition of buildings in cities is one of the chief powers now conferred upon municipal boards of health, and their orders under such powers are almost uniformly sustained. Thus a statute requiring that tenement houses should have water furnished in sufficient quantity at one or more places on each floor occupied, or intended to be occupied, by one or more families, and that all tenement houses should be furnished with a like supply of water by the owners thereof wherever they shall be directed to do so by the board of health, was sustained as a valid exercise of the police power, both with respect to the public health and the public safety, and a board of health had power to act under its provisions: *Health Department v. Rector of Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833. In *Health Department v. Lalor*, 38 Hun, 542, a board of health was deemed to have power to regulate the method of connecting a private sewer from a house with the public sewer, and the property owner was enjoined from putting in plumbing and drainage in violation of the orders of the board. And a board may prohibit the use of a tenement house as long as it remains in an unsanitary condition: *Egan v. Health Department*, 20 Misc. Rep. 38; 45 N. Y. Supp. 325. Under a statute giving boards of health the power to regulate the plumbing of buildings, and requiring plans to be submitted to them for their approval, a property owner, after submitting his plans to a board and having them approved, with alterations, is required to follow them if he proceeds with the work: *Johnston v. Belmar*, 58 N. J. Eq. 354, 44 Atl. 166. But if the owner fails to comply with the orders of the board, the board has no power to cut off his water supply, since their orders are to be enforced by the penalties prescribed:

Johnston v. Belmar, 58 N. J. Eq. 354, 44 Atl. 166. A board of health was held to have no power to restrict the owner of a stable to the mode of laying a stable floor, though if the owner departed from the method prescribed he took the risk of creating a nuisance: *Morford v. Board of Health*, 61 N. J. L. 386, 39 Atl. 706. This case seems to recognize that power to prescribe specific plans for the drainage of buildings may lawfully be conferred upon boards of health, but that the statute in this case did not confer such power, and, therefore, if the property owner did not create a nuisance he might follow his own plans. Certainly, the legislature may, in the proper exercise of its police power, prescribe the method of draining buildings. It would seem to be within the legitimate scope of the powers of a board of health to make a special order for the ventilation or other improvement of particular premises when in a condition dangerous to life or health: *Health Department v. Knoll*, 70 N. Y. 530. The legislature may require meat inspectors to act under the authority and supervision of the board of health, and this even though the state constitution confers upon municipal corporations and parishes the power to regulate within their limits the slaughtering of animals for human food: *State v. Slaughterhouse etc. Co.*, 46 La. Ann. 1031, 15 South. 408. Where the power to regulate cesspools and the removal of their contents is conferred upon boards of health, such boards have authority to designate a place for the deposit of night soil, though it is not given in express terms: *Courter v. Newark*, 54 N. J. L. 325, 23 Atl. 949. The regulation of a board of health that no cesspool shall be built within twenty-five feet of any door or window of a residence, and requiring its removal if so built, is a reasonable sanitary regulation: *Cartwright v. Cohoes*, 39 App. Div. 69; 56 N. Y. Supp. 731. While a board of health, in acting under its power to abate nuisances, cannot assume in advance that all sinks and privies in a city will become nuisances: *Gregory v. New York*, 40 N. Y. 273; yet the legislature may require that all buildings shall have water-closets connected with the public sewer, and shall not have a cesspool or privy, except where, in the opinion of the board of health, it can be allowed to remain temporarily, and then only as the board shall approve, and such a regulation applies to buildings already built when the act goes into operation: *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522. But where an old water-closet has become clogged up and can be put in good and proper condition, the board of health cannot require an entirely new sewer connection to be made, and new water flushed closets put in: *Eckhardt v. Buffalo*, 19 App. Div. 1; 46 N. Y. Supp. 204. Hogs may properly be prohibited in cities: *State v. Holcomb*, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; *Commonwealth v. Patch*, 97 Mass. 221; *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860. But a regulation by a state board of health, applicable to the whole state without reference to location

or condition, that no one shall maintain a pigpen within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of any street or inhabited house, is unreasonable and void: *State v. Speyer*, 67 Vt. 502, 48 Am. St. Rep. 832, 32 Atl. 476.

Under a general power to make such regulations as are necessary to preserve and protect the public health, a board of health has no power to license certain businesses. Hence a regulation forbidding the keeping of cows within two hundred feet of a dwelling without a special permit from the board is invalid as in excess of its powers: *Flushing v. Carraher*, 87 Hun, 63, 33 N. Y. Supp. 951. In this case it was suggested that to give to boards of health "the licensing power, or power to dispense with their own general regulations in behalf of some favored individual might lead to the greatest abuse and jobbery." And even where power is conferred by statute to license the carrying on of a lawful business, if the power to grant or refuse a license rests in the mere pleasure of the board, the law will be invalid and such arbitrary power cannot be exercised: See *Plymouth v. Schultheis*, 135 Ind. 339, 35 N. E. 12. No doubt, power to license trades which may become obnoxious can be conferred upon boards of health, but the granting of licenses should not rest in the mere caprice of the board, for this would confer power to give special privileges to some citizen not belonging to all. This objection seems not to have been fully appreciated by the court in *Quincy v. Kennard*, 151 Mass. 563, 24 N. E. 860, where the regulation of a board of health was sustained which prohibited the keeping of swine within the town without a permit in writing first obtained from the board. The case of *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 395, 44 N. E. 116, is open to a similar criticism, where the court sustained a statute which prohibited the carrying on of a livery-stable for more than four horses, unless first licensed so to do by the local board of health.

Power to Make Quarantine Regulations is one of the most frequent powers conferred upon boards of health. Such regulations constitute a proper exercise of the police power. Under this power regulations may be adopted which provide for the isolation of persons who have infectious and contagious diseases, and which prevent persons so affected from coming, or which prohibit infected goods from being carried, within the jurisdiction of the board. Hence a board may quarantine a whole house occupied by persons sick with the smallpox, even though well persons are also confined in the house until the quarantine is raised. And in such a case the health authorities are not required to remove the sick persons to a pesthouse at the request of the other occupants of the house: *Whidden v. Cheever*, 69 N. H. 142, 76 Am. St. Rep. 154, 44 Atl. 908. And a board of health may be empowered to remove all smallpox patients to one pesthouse upon the order of less than a quorum of such board: *Hengehold v. Covington* (Ky.), 57 S. W. 495. Where small-

pox is in one-half of a double house, a board of health may quarantine the entire house, under a statute authorizing them to take whatever measures may be necessary in cases of epidemic disease: *Highland v. Schulte* (Mich.), 82 N. W. 62. A board may not only control and isolate infected persons and things after they come within the town, but may also prevent the bringing of such persons or things within the town. Thus a board of health may prevent the landing of passengers from an infected vessel: *Young v. Flower*, 3 Misc. Rep. 34; 22 N. Y. Supp. 332. And a state may detain immigrants from noninfected places who have traveled with others from infected localities: *Minneapolis etc. Ry. Co. v. Milner*, 57 Fed. 276. A state board of health may be authorized to establish a quarantine system for the purpose of preventing immigrants and other persons from entering the state and going from place to place within it who are likely to carry infectious diseases, and generally to establish quarantine regulations and rules and detain and disinfect baggage and other property: *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525, 60 N. W. 440. But such board cannot be empowered to subject the baggage of all immigrants to disinfection, whether such immigrants come from a locality where any dangerous, communicable disease exists or not: *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525, 60 N. W. 440. While the powers of boards are very extensive and will be upheld whenever possible, and every presumption is indulged to sustain the validity of their action, their powers are not absolute. To sustain a quarantine the emergency must actually exist. And while, under ordinary circumstances, courts will not undertake to review the finding of health authorities that the emergency does exist and that the quarantine is necessary, yet the health authorities are not the final and conclusive judges of the necessity for the establishment of a quarantine in all cases: *Jew Ho v. Williamson*, 103 Fed. 10; *Young v. Flower*, 3 Misc. Rep. 34; 22 N. Y. Supp. 332. And boards of health cannot arbitrarily establish a quarantine and impose unreasonable and unnecessary restrictions upon private business and lawful occupations, not adapted to the end of protecting the public. Hence where not exceeding nine persons in a city were supposed to have died with bubonic plague, and no living persons were known to have contracted the disease, a regulation establishing a general quarantine district, embracing a territory covering twelve blocks, in which more than ten thousand persons reside, which prohibits persons from entering or leaving such district, but permits free intercourse between all persons within it, cannot be upheld as a reasonable regulation for preventing the spread of the disease, but its effect must necessarily be, if the disease exists within the district, to facilitate its spread among all persons confined within its limits: *Jew Ho v. Williamson*, 103 Fed. 10. Where a board of health has power to make reasonable regulations to protect the health of a city, and such board believes that bubonic plague exists in the city,

an order is unreasonable and void as an unconstitutional invasion of the rights of the persons against whom it is directed, which prohibits Chinese from leaving the city without first being inoculated with a serum supposed to be a preventive, but the administration of which to a person who has been exposed to the disease is dangerous to life, where the regulation applied only to the Chinese, and included them as a class without regard to the previous condition, habits, exposure to disease, or residence of the individual, and where the Chinese resided in many parts of the city and were not shown to be more subject to the disease than others, and it was not claimed that the disease existed outside the city: *Wong Wai v. Williamson*, 103 Fed. 1.

The power to isolate and quarantine a person infected with a contagious disease does not authorize a board of health to take possession of a dwelling-house to the exclusion and without the consent of the occupant or owner, and use the house as a hospital for a person found therein who is too sick to be removed: *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334; *Brown v. Murdock*, 140 Mass. 314, 3 N. E. 208. But persons with infectious diseases may be removed from dwelling-houses against their consent and the consent of those in whose care they are, where it is reasonably necessary to protect the public health: *Haverty v. Bass*, 66 Me. 71. Boards of health cannot make quarantine regulations which are inconsistent with statutory provisions relative to the same subject: *Ex parte O'Donovan*, 24 Fla. 281, 4 South. 789. In *Forbes v. Board of Health*, 28 Fla. 26, 9 South. 862, it was held that a county board of health had no authority, without an examination or inspection, to require vessels upon entering port to deviate from their course six miles and go to a quarantine station for inspection and examination.

In the exercise of their quarantine powers a board of health cannot do or authorize acts which will be nuisances. Hence they cannot place a pesthouse within one hundred and ninety-two feet of a schoolhouse, so as to destroy the usefulness of the schoolhouse, and the board will be enjoined from maintaining the pesthouse so near the school: *Thompson v. Kimbrough*, 23 Tex. Civ. App. 350, 57 S. W. 328. And a city board of health cannot establish a pesthouse upon land in another township, though the land is owned by the city, and such action may be enjoined even without a preliminary showing that the city is about to create a nuisance: *Warner v. Stebbins* (Iowa), 82 N. W. 457. A board of health cannot thus transfer a person affected with a dangerous disease to the jurisdiction of another board.

In *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123, 70 N. W. 347, it was held to be an unwarranted delegation of legislative power to authorize a state board of health to designate what diseases are contagious or dangerous to the public health in making regulations to protect the public health from such diseases.

For a more extended treatment of quarantine regulations, see the monographic note in 47 Am. St. Rep. 533-552.

Vaccination.—The principal case is authority for the rule that a board of health may be empowered to require compulsory vaccination when necessary to protect the health of the state. The authorities are a unit to the effect that such power can be conferred and exercised when essential to the interests of the public health: See *State v. Hay*, 126 N. C. 999, 78 Am. St. Rep. 691, 35 S. E. 459; *State v. Board of Education*, 21 Utah, 401, 60 Pac. 1013; *Matter of Rebenack*, 62 Mo. App. 8. Statute may not always confer the power to require compulsory vaccination, however, and in such cases the powers of a board are more limited. Even where such power is not expressly conferred, a board of health may require that children shall either be vaccinated or remain away from school until the danger from smallpox is past: *State v. Board of Education*, 21 Utah, 401, 60 Pac. 1013. A contrary holding seems to have been made in *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123, 70 N. W. 347, where it was said that in the absence of a statute requiring vaccination as one of the conditions of the right of attending the public schools, a state board of health had no power to exclude from the public schools all children who do not present certificates of vaccination. This holding was unnecessary to the decision, for it appeared that there was no smallpox epidemic in the city, and no sufficient cause for the authorities to believe that the disease would become prevalent in the city where the rule was sought to be enforced. The regulation was therefore unreasonable and arbitrary, for it seems clear that where no smallpox exists in the community and there is no reasonable ground to apprehend its appearance, a board of health has no power to require compulsory vaccination as a prerequisite to attending a public school: *Lawbaugh v. Board of Education*, 177 Ill. 572, 52 N. E. 850; *School Directors v. Breen*, 60 Ill. App. 201; *Potts v. Breen*, 167 Ill. 67, 59 Am. St. Rep. 262, 47 N. E. 81. While the ruling in the Wisconsin case was not necessary to the decision, we do not believe it can be sustained upon principle. Even where only general power to adopt any measures necessary to protect the public health is conferred on a board of health, under such power a board should be authorized to require not compulsory vaccination, but vaccination as a condition precedent to attending the public schools, where there is an immediate, present necessity, occasioned by a reasonable, well-founded belief and apprehension that smallpox is prevalent in the community in which the school is located, or is approaching that vicinity. In cases of such emergency, where it is necessary to prevent the contagion of smallpox, a board of health may require vaccination, in the exercise of the police power: See *School Directors v. Breen*, 60 Ill. App. 201; *Potts v. Breen*, 167 Ill. 67, 59 Am. St. Rep. 262, 47 N. E. 81; the principal case. There may be exceptional cases, where a person need not comply with the orders of a board of

health respecting vaccination, as where his health is in such a condition that it would be dangerous. In such cases, if he is prosecuted for a failure to comply with the orders of the board, this is a matter of defense which he must prove: *State v. Hay*, 126 N. C. 999, 78 Am. St. Rep. 691; 35 S. E. 459. A board of health has no authority to quarantine a person who refuses to be vaccinated during a smallpox epidemic, merely because he is in the express business and might handle goods coming from the infected district. To justify such isolation the person must either be infected with the contagious disease or have been exposed to it. The mere possibility that he may be seized with smallpox if he should carry goods from the infected district shows no facts which will justify the taking of such drastic measures: *Matter of Smith*, 146 N. Y. 68, 48 Am. St. Rep. 769, 40 N. E. 497. In *Wong Wai v. Williamson*, 103 Fed. 1, the regulation of a board of health requiring Chinese to be vaccinated for bubonic plague, irrespective of the previous condition, habits, exposure to disease, or residence of the individual, and which did not require the members of any other race to be vaccinated, and it was not shown that the Chinese were more subject to the disease than others, was held to be unreasonable and void.

Destruction of Property.—A board of health may, no doubt, be empowered to destroy property which is a nuisance and dangerous to the public health. And this is not taking private property without compensation: *Mayor etc. v. Mulligan*, 95 Ga. 323, 51 Am. St. Rep. 861, 22 S. E. 621. This power even includes the removal or destruction of buildings: *Egan v. Health Department*, 20 Misc. Rep. 38; 45 N. Y. Supp. 225. In *Smith v. Irish*, 37 App. Div. 220, 55 N. Y. Supp. 837, a board of health was held to have ample power to remove or cause to be removed the third story of a building, which, by reason of fire, had become a nuisance and dangerous to the lives of persons who might wish to travel on the sidewalk adjacent thereto. Property may not be destroyed, however, unless destruction is necessary by way of abating the nuisance. If the nuisance can be abated by a discontinuance or change of the use to which it is put, it must be abated in that way: *Health Department v. Dassori*, 21 App. Div. 348; 47 N. Y. Supp. 641. In this case it appeared that certain tenement houses were a nuisance and the board of health ordered their destruction, but the court held that since they could be repaired so that the evil smells and the sources of contagion were removed, they would then cease to be nuisances, and the mere fact that they could never be made fit for human habitation did not authorize their destruction. The case is also authority for the proposition that the owner of a tenement house cannot be compelled to submit to its destruction, merely because some building adjacent to it, by reason of its existence, is deprived of proper ventilation. In *Prichard v. Commissioners*, 126 N. C. 908, 78 Am. St. Rep. 679, 36 S. E. 353, it was held that town commissioners acting as health

authorities had no power to burn a dwelling-house in which small-pox had existed to prevent the spread of the disease. The extent of their powers as conferred by statute was to properly disinfect the property. While this decision is based upon the extent of the powers conferred by statute, it seems not open to question that health authorities may be empowered to destroy even dwelling-houses, where this is absolutely essential to protect the public health. Statute may require compensation for even the necessary destruction of property: *Egan v. Health Department*, 20 Misc. Rep. 38; 45 N. Y. Supp. 325. The exercise of judgment or discretion in determining whether property shall be destroyed or not cannot be delegated by a board of health to an officer or agent. Hence, it has been held that a board could not delegate to an officer of the society for the prevention of cruelty to animals its authority to destroy, as being dangerous to the public health, horses afflicted with glanders: *Westchester etc. R. R. Co. v. Angevine*, 52 App. Div. 239; 65 N. Y. Supp. 376.

Prescribe Criminal Penalties.—The legislature may confer upon boards of health the power to enact sanitary regulations, having the force of law, within their jurisdiction. And the legislature may prescribe that a violation of the ordinances passed by such boards shall be a misdemeanor and punishable as such: *Polinsky v. People*, 73 N. Y. 65; *People v. Special Sessions*, 7 Hun, 214. And in *McNall v. Kales*, 61 Hun, 231; 16 N. Y. Supp. 7, the court went even further and upheld a statute which empowered a town board of health not only to make orders and regulations necessary for the preservation of life and health, a violation of which the legislature declared to be punishable as a misdemeanor, but authorized such board to itself impose penalties for the violation of their regulations, and to maintain suits to recover such penalties. As to municipal boards of health, there seems to be no doubt that the legislature may confer upon them power to pass ordinances and regulations, a violation of which shall constitute misdemeanors. The power to create and maintain municipal corporations who have authority to enact and enforce ordinances is universally recognized. The legislature may confer such power either upon the mayor and common council of a municipality or upon its board of health; *People v. Special Sessions*, 7 Hun, 214. The question is one of more difficulty where power is conferred upon state boards to enact ordinances which shall have the force of laws and a violation of which shall constitute a criminal offense. If the legislature has itself prescribed the powers of the board it may make the refusal to recognize the authority of the board a misdemeanor where the action of the board is confined to the making of rules relative to matters of detail; and such rules are limited to the purposes specifically described by the statute. Thus where the legislature made it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with rules and regulations formulated by

the state board of health the act was sustained, since the board of health did not exercise legislative powers, but were confined to the making of rules governing matters of detail respecting the purposes specifically described by the act: *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525, 60 N. W. 440. Whether the legislature has conferred upon a state board legislative power to declare what acts shall constitute crimes, and to provide a penalty for their commission, may oftentimes be a question of considerable nicety. Clearly, the legislature cannot confer upon state boards a power to legislate. Hence, where it attempts to delegate to an executive body the power to impose a penalty for the violation of a rule or regulation, the act is invalid, though the legislature fixes the maximum of such penalty: *Harbor Commrs. v. Redwood Co.*, 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375. This was not a state board of health, but the principle involved is the same. Similarly, in *Ex parte Cox*, 63 Cal. 21, where power was conferred upon a board of state viticultural commissioners to make and enforce rules and regulations in the nature of quarantine for certain purposes, the act was declared to be unconstitutional as a delegation of legislative power, in so far as it declared that a violation of the regulations of the board should be a misdemeanor, since it attempted to confer upon the board the power to declare what acts should constitute a misdemeanor. With respect, then, to the power of the legislature to confer upon boards of health authority to enact regulations a violation of which shall constitute a crime, municipal boards seem to occupy a much more favored position than state boards.

Hospitals.—Even under a statute or ordinance conferring but general power to exercise supervision over the health of the community, a board of health may provide a hospital building whenever it is necessary for the proper protection of the public health. Hence, such a board may rent a building to be used as a hospital, to protect the city from the infection of cholera: *Aull v. Lexington*, 18 Mo. 401. And it may bind a county to pay for materials for the erection of a pesthouse to prevent the spread of a contagious disease: *Staples v. Plymouth County*, 62 Iowa, 364, 17 N. W. 569.

Medical Examinations.—A state board of health may be empowered to examine applicants for the practice of medicine, and this may include an examination not only into the literary and technical attainments of the applicants, but also their moral character. This is not a delegation of judicial power: *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081. Conferring such power upon boards of health is a police measure, and such boards will not be enjoined from issuing a certificate licensing a physician and surgeon to practice medicine: *Lincoln Medical College v. Poynter (Neb.)*, 82 N. W. 855. One who practices osteopathy does not practice medicine, and is not required to procure a certificate to practice from a state board of health, and such board has no authority to interfere with or molest an osteopath in the practice of his profession. Hence, a state

board of health will be enjoined from interfering with one who practices osteopathy as a profession: *Nelson v. State Board of Health* (Ky.), 57 S. W. 501.

Transporting Dead Bodies.—A state board of health may be empowered to make regulations respecting the transportation of dead bodies. It is clearly a power in the interest of the public health. Hence, a regulation of such a board providing that every dead body must be accompanied by a person in charge, who must present a transit permit from the proper health authority, giving permission for the removal, and showing the name and age of the deceased, the place and cause of death, the point to which it is to be shipped, and the names of the medical attendant and undertaker, is a reasonable regulation. And where the transit permit does not comply with this regulation a railroad company may refuse to carry a dead body: *Lake Erie etc. R. R. Co. v. James*, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192.

The Power to Approve or Disapprove Action Taken by Municipal Authorities in passing ordinances relating to sanitary or health regulations is solely a power to approve or disapprove, and does not authorize a board of health to revise or amend any ordinance submitted to it: *Darcantel v. Slaughter House Co.*, 44 La. Ann. 632, 11 South. 239.

Employing Assistants.—Boards of health may be empowered to employ assistants and agents when necessary to the proper performance of their duties. Hence, under a statute authorizing the employment of such persons as may be necessary to carry its orders and regulations into effect, the right of a board of health to employ assistants is not limited to commence upon the making of a valid regulation or order, but extends to the right to employ a person to inspect and report to the board upon a given situation, although no rule or regulation has been made in respect thereto: *Kent v. North Tarrytown*, 50 App. Div. 502, 64 N. Y. Supp. 178. A board of health cannot, however, delegate to an agent or assistant the exercise of its judgment or discretion, and any act the doing of which requires the exercise of discretion cannot be delegated: *Westchester etc. R. R. Co. v. Angevine*, 52 App. Div. 239; 65 N. Y. Supp. 376.

Expenses.—A city board of health is a part of the municipal government, and under a statute authorizing such board to make an estimate of its probable expenses for the year, which shall be forwarded to the mayor and city council, who shall make such appropriation as is necessary, the board has no unrestricted power to determine for itself how much money should be appropriated for its purposes. There is no more ground for independent action on its part in this matter than there would be for the police department, or any other department of the city. Such a situation, said the court in *State v. Common Council*, 52 La. Ann. 1263, 27 South. 572, "would be subversive of the theory of good government."

GAFF v. STATE.

[155 Ind. 277, 58 N. E. 74.]

JURORS — DISQUALIFICATION — DEPUTY SHERIFFS.

A sheriff, whose salary is paid out of fees earned and collected, has such a pecuniary interest in securing convictions in criminal cases that his deputies, as his employes, are not competent to serve as jurors in such cases.

JURORS—COMPETENCY—CHALLENGE FOR CAUSE—CONSTITUTIONAL GUARANTY.—Although a statute professes to give all the grounds of challenging jurors for cause, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent.

NEW TRIAL—DEPUTY SHERIFFS AS JURORS—CRIMINAL CASE.—A defendant in a criminal case is entitled to a new trial, where two of the jurors called as talesmen were deputy sheriffs, which fact was not known to the defendant or his attorneys until after the return of the verdict.

T. M. Eels and R. P. Barr, for the appellant.

W. L. Taylor, attorney general, T. V. Whiteleather, Merrill Moores, and C. C. Hadley, for the state.

²⁷⁷ **BAKER, C. J.** Appellant was convicted of assault and battery with intent to commit a rape. He complains of the refusal of the court to grant him a new trial. Among the reasons assigned, it was stated that two of the jurors were deputy sheriffs of the county. In support of the motion, appellant filed his affidavit that the two jurors were deputy sheriffs, that they were not of the regular panel but were called as talesmen, that neither appellant nor his attorneys knew that the two jurors were deputy sheriffs until after the return of the verdict, that the two jurors were examined generally as to their competency, but failed to disclose that ²⁷⁸ they were deputy sheriffs, and that if the facts had been known to appellant he would have challenged them from the jury. One of appellant's attorneys filed his affidavit that after the return of the verdict the sheriff informed him that the two jurors were deputy sheriffs when they tried the case. Both of appellant's attorneys filed affidavits that they had no notice nor knowledge that the two jurors were deputy sheriffs until after the return of the verdict, and that if they had known the fact they would have interposed challenges for cause. In opposition to the motion, the two jurors filed their affidavits that they were not biased against appellant, that they

had no pecuniary interest in the result of the case, that they did not arrest appellant, that they did not serve any subpoenas or other writs in the case, and that they were not to receive any part of the sheriff's costs.

These deputies were not competent to serve on the impartial jury that is guaranteed by the constitution. The sheriff is now paid a salary, and the fees belong to the county. But, inasmuch as the county does not pay the sheriff his salary except out of fees earned and collected, the sheriff has a clear pecuniary interest in securing convictions in criminal cases, since no judgment for costs can be rendered against the state. These deputies, therefore, stood in the position of employés of one who was pecuniarily interested in their verdict. And, though section 1862 of Burns' Revised Statutes of 1894, section 1793 of the Revised Statutes of 1881 and Horner's Revised Statutes of 1897, professes to give all the grounds of challenge for cause, of which the present is not one, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent: *Block v. State*, 100 Ind. 357; *Zimmerman v. State*, 115 Ind. 129, 17 N. E. 258; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866.

These deputy sheriffs would doubtless have been rejected by the court on challenge for cause if the facts had been made known. Appellant was not bound to anticipate that talesmen would be called from among the sheriff's deputies, ²⁷⁹ and these men should have disclosed the relationship on the general examination as to their competency: *Block v. State*, 100 Ind. 357; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429, 27 N. E. 866.

Judgment reversed, with directions to sustain the motion for a new trial.

JURORS.—WHAT MATTERS DISQUALIFY A JUROR: See the monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744-760.

NEW TRIAL.—THE DISQUALIFICATION OF A JUROR as a ground for a new trial cannot be urged after verdict in a criminal case: *State v. Button*, 50 La. Ann. 1071, 69 Am. St. Rep. 470, 23 South. 868; *Tolbert v. State*, 71 Miss. 179, 42 Am. St. Rep. 454, 14 South. 462.

WAGGONER v. STATE.

[155 Ind. 341, 58 N. E. 190.]

HOMICIDE—INDICTMENT—CAUSE OF DEATH.—Where the evidence before a grand jury points clearly to the commission of a murder by the accused, but from such evidence they are in doubt as to the cause of death, a count of the indictment may be framed alleging that the death was caused in some manner to them unknown.

HOMICIDE—INDICTMENT—ALLEGING ASSAULT.—In an indictment for murder, it is unnecessary to charge, in formal and express terms, an assault or an assault and battery.

J. R. East, R. H. East, and E. S. Davis, for the appellant.

W. L. Taylor, attorney general, H. L. McGinnis, C. D. Hunt, Merrill Moores, and C. C. Hadley, for the state.

³⁴² MONKS, J. Appellant was by a jury found guilty of murder in the first degree, as charged in the second count of the indictment, and his punishment assessed at imprisonment in the state prison for life. The assignment of errors calls in question the sufficiency of the second count of the indictment. Said count, omitting surplusage, date, venue, and formal parts, charges that "William Waggoner did feloniously, purposely, and with premeditated malice kill and murder one Clara Waggoner by means and ways unknown to this grand jury and by reason of the use of said unknown means and ways the said Clara Waggoner then and there died."

The statutes of this state provide that an indictment is sufficient if the offense charged is set forth in plain and concise language without unnecessary repetition, and with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case: Burns' Rev. Stats. 1894, sec. 1824, cl. 4; Rev. Stats. 1881 and Horner's Rev. Stats. 1897, sec. 1755; but that no indictment shall be deemed invalid or quashed for certain defects named, or "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits": Burns' Rev. Stats. 1894, sec. 1825; Rev. Stats. 1881 and Horner's Rev. Stats. 1897, sec. 1756.

Under these provisions, it is the duty of a grand jury in framing an indictment to state their charge with reasonable certainty. The indictment, however, is only the charge of the grand jury; and if the evidence before them points to the commission of a murder by the accused in two or more modes, but leaves it

doubtful in which, it is proper to present different counts, stating the cause of death in different ways, so as to meet the facts as they may appear at the trial; and if, from the evidence before them, they are in doubt as to the cause of death, a count may be framed alleging that the death was caused in some manner to them unknown: *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. ³⁴³ Dec. 711; *Commonwealth v. Coy*, 157 Mass. 200, 215, 32 N. E. 4, and cases cited; *Cox v. People*, 80 N. Y. 500, 516, and cases cited; *People v. Cronin*, 34 Cal. 191, 200, 210; *Edmonds v. State*, 34 Ark. 720.

As was said in Bishop's New Criminal Procedure, sections 495, 553: "Undoubtedly, a grand jury should not indict a man unless reasonably informed of his guilt. But the jurors may know it sufficiently, while ignorant of an identifying circumstance, such as ordinarily ought to appear in allegation. Then they may state the main facts, adding that this circumstance is unknown to them, and the indictment will be good. Thus, if they are ignorant of an identifying name, the allegation may be in this form. And other circumstances of the offense, if unknown to the grand jury, may be dealt with in the same way; that is, the indictment, instead of saying what they are, may state that they are to them unknown. In homicide the indictment may charge that it was committed 'in some way and manner, and by some means, instruments, and weapons to the jurors unknown' if in fact the grand jury are unable on investigation to be more specific."

Said second count is in the usual form of indictments for murder in the first degree in this state, except that the means used in taking the life of the deceased are not stated: *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *Dennis v. State*, 103 Ind. 142, 144, 145, 2 N. E. 349, and cases cited.

In *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 712, a count of the indictment charged that "Webster . . . in and upon the said George Parkman, feloniously, willfully, and of his malice aforethought, did make an assault; and him, the said George Parkman, in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, willfully, and of malice aforethought, deprive of life, so that," etc. The same was held sufficient.

In *Edmonds v. State*, 34 Ark. 720, 722, the second count charged ³⁴⁴ that "Thomas Edmonds . . . willfully, deliberately, feloniously, of his own malice aforethought, and with premeditation, did kill and murder a certain woman, whose Chris-

tian name was Julia, but whose surname is to the jurors unknown, then and there being, in some way and manner, and by some means, instruments, and weapons to the jurors unknown," etc. It was held that the same was good.

It is true that said second count in this case does not use the words "make an assault," as in the count held good in the Webster case, but it has been uniformly held in this state that it is not necessary in an indictment for murder to charge, in formal and express terms, an assault or an assault and battery: Dennis v. State, 103 Ind. 142, 145, 2 N. E. 349, and cases cited. In all essential features the second count in this case is substantially the same as that in the Webster case and in the first count in the Edmonds case, which were held sufficient.

It is insisted that the indictment does not charge appellant with using said "unknown means and ways," or that he was in any way connected with her death. The indictment, in plain and direct terms, charges that appellant "did kill and murder Clara Waggoner by means and ways unknown, and that, by reason of the use of said unknown means and ways, said Clara Waggoner then and there died." If appellant, feloniously, purposely, and with premeditated malice, killed and murdered the deceased by said unknown means, as charged, he certainly used said means to kill her.

Appellant cites Shepherd v. State, 54 Ind. 25, but in that case the pleader attempted to allege the way the deceased was killed, but failed to do so. The sufficiency of such an indictment is governed by rules not applicable in this case; and that case is therefore not in point here. Littell v. State, 133 Ind. 577, 33 N. E. 417, is also cited by appellant, but the part of that case relied upon was disapproved in Green v. State, 154 Ind. 655, 57 N. E. 637. It follows that there is no defect or imperfection ³⁴⁵ in said second count which tends to prejudice the substantial rights of appellant upon the merits of the case: Burns' Rev. Stats. 1894, sec. 1825; Rev. Stats. 1881 and Horner's Rev. Stats. 1897, sec. 1756. The court did not err, therefore, in overruling the motion to quash.

Judgment affirmed.

AN INDICTMENT FOR MURDER is sufficient which charges that the murder was done "in some way and manner, and by some means, instruments, and weapons to the jury unknown": State v. Williams, 7 Jones, 446, 78 Am. Dec. 248; Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711. See, too, State v. Jenkins, 14 Rich. 215, 94 Am. Dec. 132.

OSBORNE v. ESLINGER.

[155 Ind. 351, 58 N. E. 439.]

DEEDS—DELIVERY TO THIRD PERSON FOR GRANTEE.—Where a claim of title rests upon the delivery of a deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently or at some future day, the grantor parting and intending to part with all dominion and control over it, so that it would be the duty of the custodian for the grantee, on his behalf, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him.

DEEDS—DELIVERY TO THIRD PERSON FOR GRANTEE—WHAT INSUFFICIENT.—If a deed is placed in the hands of a third person, as the agent, servant, friend, or bailee of the grantor for safekeeping only, and not for delivery to the grantee, and the fact that the instrument is a deed is not made known to such third person, and the name of the grantee, or other description of him, is not given, if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land, such transfer does not constitute a delivery, and the instrument falls for want of execution.

DEEDS—DELIVERY—CUSTODY OF THIRD PERSON.—Where a grantor signs and acknowledges deeds which she keeps in her possession for two years, when she hands a package containing such deeds and her will to an aged relative, with instructions to take care of such papers until her death and then deliver them to the one who was to settle her estate, and later she took the package from such relative and kept it in her possession, telling her relative if she got sick to take care of the papers, and in case of her death to deliver them to the one who settles her estate, such acts do not constitute a delivery of the deeds to the grantees.

DEEDS—DELIVERY ESSENTIAL.—Even in the case of a voluntary deed of settlement, delivery is essential to the validity of the deed, and it must be made either to the grantee or to some third person for his use.

PARTITION—ATTORNEYS' FEES.—Where a defendant appears by counsel to contest a petition for partition, he should not be required to pay the counsel fees of his adversary.

J. T. Hays and J. S. Bays, for the appellants.

J. C. Briggs and J. W. Lindley, for the appellee.

³⁵¹ **DOWLING, J.** Action for the partition of lands. Issues were formed; there was a trial by the court, a special finding of facts on which the court stated its conclusions of law, and judgment for appellee.

³⁵² The following is the substance of the special finding: Martha J. Osborne, a widow, was the owner in fee simple of the lands described in the complaint, and resided thereon at the

time of her death, which took place April 23, 1897; she left surviving her the appellants, who were her children, and the appellee, who was her grandchild, and the only heir of a deceased daughter of Mrs. Osborne; the latter executed a will April 3, 1894, which was duly admitted to probate, by which she divided her personal estate equally among her surviving children, the appellants herein, one William L. Dix being nominated as executor.

March 6, 1893, the said Martha J. Osborne, by deed, conveyed a part of her real estate to her sons Hardy Osborne and James A. Osborne, two of the appellants, and on May 16, 1895, she caused to be prepared, and then signed and acknowledged three other deeds, viz., a deed to George W. Osborne and Josephine Dix, a deed to Elizabeth Riggs and Matilda Drake, and a deed to Stephen Parks Osborne and Allen T. Osborne. Said three deeds purported to convey all the lands owned by Mrs. Osborne, excepting those described in the deed previously made to Hardy and James A. Osborne. Mrs. Osborne placed the four deeds in an envelope, indorsed, "Martha J. Osborne. Deeds to children," sealed it, took them home with her, and kept the deeds in her possession until the spring of 1897.

After the execution of her will, she placed it in an envelope, which was then sealed, and indorsed "Last will of Martha J. Osborne," and the will so remained until after the death of the said testatrix.

In the spring of 1897, Mrs. Osborne handed the deeds and the will, wrapped together in a paper, to one Mary Davis, an aged sister in law, who made her home with her, saying that she desired Mrs. Davis "to take care of the papers, and keep them until after her, Mrs. Osborne's, death, and then deliver them to the one who should settle her estate." Upon reflection, and because of the advanced ³⁵³ age of Mrs. Davis, who was then seventy-two years old, Mrs. Osborne took back the papers, and put them in a "press" in her home, and told Mrs. Davis she had placed them there, adding, "In case I get sick, you take care of these papers, and when I die give them to the one who settles my estate." Mrs. Osborne was then in good health, but soon afterward became very ill. Agreeably to her instructions, Mrs. Davis took the papers from Mrs. Osborne's "press," and deposited them in a box of her own, over which she had exclusive control, and so kept them until after the death of Mrs. Osborne. The next day after Mrs. Osborne was taken sick she called Mrs. Davis to her bedside, and asked if she had taken charge of the

papers, as she, Mrs. Osborne, had requested. Mrs. Davis answered, "Yes, I have." Mrs. Osborne responded, "All right." Mrs. Osborne died April 23, 1897.

Soon after the death of Mrs. Osborne, Mrs. Davis met all of the appellants, and also William L. Dix (who had been named as executor of Mrs. Osborne's will), at the late residence of the decedent. She handed the envelope containing the deeds to Allen T. Osborne, who read them, and delivered them to the grantees, respectively. The grantees caused the deeds to be recorded in the proper office, and thereupon took and ever since have held possession of the several parcels of land. The will of Mrs. Osborne, also, was delivered by Mrs. Davis to Allen T. Osborne at the time the deeds were delivered. It was opened, read, and was afterward admitted to probate in the proper county, and is yet in full force. Mrs. Mary Davis had no knowledge that the package intrusted to her by Mrs. Osborne contained said deeds and will until after the death of Mrs. Osborne, but she did know that Mrs. Osborne had selected William L. Dix to settle her estate.

The conclusions of law stated by the court upon the foregoing facts were these: "1. That the said deeds made by Martha J. Osborne to the several cross-complainants herein ³⁵⁴ were not fully and lawfully executed, for want of a lawful delivery; 2. That the plaintiff is the owner in fee simple, by descent from Martha J. Osborne, of an undivided one-ninth interest in the following real estate, in Sullivan county, Indiana, to wit, the southeast quarter of section 7, township 8 north, range 9 west, one hundred and sixty acres more or less; 3. That the plaintiff is entitled to partition of her interest in said land."

It is contended on behalf of appellants that the acts and words of Mrs. Osborne, when she placed the deeds in her "press," and instructed Mrs. Davis that in case she, Mrs. Osborne, got sick, to take care of the papers, and when she died to give them to the one who settled her estate, together with the act and declaration of Mrs. Davis after Mrs. Osborne became ill in taking possession of the papers, with the knowledge and approval of Mrs. Osborne, constituted a sufficient delivery. On the other hand, the appellee insists that there was no delivery, that Mrs. Osborne never intended to part with her control over the deeds, and that Mrs. Davis held them only as the bailee and for the use of Mrs. Osborne.

This court has frequently been called upon to decide whether

or not a deed had been delivered, and a few of the cases, with the circumstances attending the supposed delivery in each of them, are the following.

In *Fewell v. Kessler*, 30 Ind. 195, the parties to a deed caused it to be prepared, and agreed that it should be signed and acknowledged, and left with a justice of the peace for the grantee. In deciding the case, Frazer, J., said: "Nothing is plainer in the law than that such facts constitute a good delivery of a deed."

One Loveless placed a deed in the hands of one Rash, to be held by him during the grantor's lifetime, for certain of Loveless' children, and, at his death, to be delivered by Rash to the grantees named therein. Rash accepted the deed and held it for the grantees until shortly after the ³⁵⁵ death of the grantor, when he delivered the same to the grantees. The court said: "These facts show that William Loveless verbally authorized Rash, as his agent, to do the things mentioned. Upon the death of Loveless the authority was thereby revoked, and Rash ceased at once to be the decedent's agent for any purpose, and therefore could not, for the deceased grantor, deliver the deed": *Jones v. Loveless*, 99 Ind. 317, 325.

In *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678, the grantor was about to undergo a dangerous surgical operation. He gave to one of his sons a large bundle of papers, among which were deeds to his children inclosed in a sealed envelope, saying, "Here are the deeds belonging to you children; take care of them, and after my death deliver them to the children." He afterward said to the son who had the papers: "I want you to see that the children get the deeds, after my death." Held, a sufficient delivery to all of the grantees.

Smiley and wife executed five deeds by which they conveyed certain lands to the husband's children and grandchildren. Two years afterward Smiley made a will in which he referred to these deeds, and directed his executor, at his death, to deliver them to the grantees. A few days after the execution of the will Smiley placed the deeds in the hands of a son, and directed him to retain them until he, the grantor, should die, and then to deliver them to the grantees, respectively. Held, a good delivery as to all: *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585.

In *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090, the deed was duly signed and acknowledged by the grantor in his lifetime, and was by him deposited in the hands of a third per-

son, with instructions to deliver to his widow after his death. Upon these facts, the court, by Mitchell, C. J., said: "Where a grantor signs and acknowledges a deed, and deposits it with a third person, to be delivered by him to the grantee at the death of the grantor, without reserving to himself any right to control or record the instrument, if the ³⁵⁶ deed is afterward delivered to the grantee the title passes, and the deed ordinarily takes effect by relation, as of the date of the first delivery."

In *Dinwiddie v. Smith*, 141 Ind. 318, 40 N. E. 748, the deed was delivered by the grantor to a third person for the use of the grantee. The deed was sustained.

S., together with his wife, signed and acknowledged a deed conveying to his daughter, Mary R., certain real estate. He handed the deed to his wife saying, "Take it, and keep it in a safe place until my death, then deliver it to B. F. Wells." Indorsed on the deed were the words, "After my death, this deed to be delivered by B. F. Wells." The wife kept the deed as directed, and, at the death of the grantor, delivered the same to Wells, who caused it to be recorded, and then delivered it to the grantee. The court held that the deed was not invalid as an attempt by the grantor to make a testamentary disposition of the land without the formalities of a will, and that the delivery to the wife for the grantee was effectual: *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515.

In *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, the facts were these: S. signed a deed, bill of sale, and promissory note, and left them upon the table. He neither said nor did anything to indicate an intention to deliver them; on the contrary, the circumstances indicated that he did not wish to execute the writings at that time. He reserved the right to examine them on the next day, and it was agreed that, if they were found to be incorrect, correction should be made. While the papers were so lying upon the table, one of the persons named in them took them up and gave them to his clerk with instructions to put them in his vault. Held, that there was no delivery.

It was said by Chancellor Kent, in *Souverbye v. Arden*, 1 Johns. Ch. 240, 255: "It is not to be understood that mere formal words of delivery will, in all cases, bind the party, and render the deed absolute. If it be declared, or ³⁵⁷ agreed, at the time of execution, that the deed is not to pass out of the possession of the grantor, until certain conditions are complied with, the deed will not operate until certain conditions are fulfilled. This has been so ruled at law, in the cases of

Jackson v. Dunlap, 1 Johns. Cas. 114, 1 Am. Dec. 100, and of Derby Canal Co. v. Wilmot, 9 East, 360, and there is much good sense and equity in the decision. But if there be no such agreement or intention made known at the time, and both parties are present, and the usual formalities of execution take place, and the contract is to all appearance consummated, and the deed is left in the power of the grantee, or in the custody of his particular friend, without special instructions, there is no case to be found in law or equity in which such a delivery is not held binding.

"A voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and, even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, beside the mere fact of his retaining it, to show it was not intended to be absolute."

Garnons v. Knight, 5 Barn. & C. 671, 687, 688, a leading English case upon the subject of what is necessary to constitute a valid delivery of a deed turned upon these facts. In July, 1814, Mr. Wynne, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above ten thousand pounds of his (Garnons') money. Garnons answered he relied and expected that Wynne would provide him securities for his money, and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words, "I deliver this as my act and ³⁵⁸ deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnons' name mentioned. In the same month of April, he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." He came for it again in a few days, and she gave it to him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. One

of the questions in the case was whether the mortgage was duly executed, and whether the delivery to the sister was a good delivery.

In deciding the case, Bayley, J., said: "Can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit [per Lord Ellenborough in *Stirling v. Vaughan*, 11 East, 619, 11 Rev. Rep. 280], and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Sheppard, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to anyone he has authorized to receive it, or delivery to a stranger for his use and on his behalf. Sheppard's Touchstone, 57; 2 Rolle's Abridgment, (K) 24, pl. 7, *Taw v. Bury*, Dyer, 167b, 1 And. 4, *Alford v. Lea*, 2 Leon. 110, 1 Cro. Eliz. 54, and 3 Coke, 27a, are clear authorities that, ³⁵⁹ on a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate instanter, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: 'If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant: 3 Henry VI, 27.' The point is put arguendo by Paston, Sergt., in 3 Henry VI, who adds, 'For a servant may do what is for his master's advantage, what is to his disadvantage, not.'"

The rule is thus stated by eminent text-writers: "Where a grantor executes a deed, and delivers it to a third person to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed, or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title": Devlin on Deeds, 2d ed., sec. 280; citing *Lang v. Smith*, 37 W. Va. 725, 17 S. E. 213; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375; *Tooley v. Dibble*, 2 Hill, 641; *Goodell v. Pierce*, 2 Hill, 659; *Squires*

v. Summers, 85 Ind. 252; Bury v. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338.

"In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element. No particular formality need be observed, and the intention to deliver the deed may be manifested by acts, or by words, or by both. But one or the other must be present to make a good delivery": Tiedeman on Real Property, 2d ed., sec. 813.

"Where the deed is delivered to the grantee named, the law presumes it was done with an intent, on the part of the grantor, to make it his effectual deed; but if it is delivered to a stranger, and nothing is said at the time, no such inference is drawn from the act of delivery. . . . If delivered to the grantee himself, no words are necessary, since the law presumes in such case it is for his use. If ³⁶⁰ delivered to a stranger, there is no such presumption; and there must, therefore, be some evidence, beyond such delivery, of his intent thereby to part with his title. But no precise form of words is necessary to declare such intent. Anything that shows that the delivery is for the use of the grantee is enough": 3 Washburn on Real Property, 5th ed., sec. 582, p. 314.

Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and authority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee.

If the deed is placed in the hands of a third person, as the agent, servant, friend, or bailee of the grantor, for safekeeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere

fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land—then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution.

As shown by the special finding, Mrs. Osborne had the ³⁶¹ deeds prepared in May, 1895. She then signed and acknowledged them. She placed them in an envelope indorsed, "Martha J. Osborne. Deeds to children." She kept them in her own possession and under her own control until the spring of 1897. She then handed a package containing the deeds and also her will to an aged lady, a relative, who made her home with her, and instructed her to take care of the papers until after her death, and then to deliver them to the one who was to settle her estate. She afterward took the package from her relative, Mrs. Davis, and placed it in a "press" in her home, informing Mrs. Davis of the fact that she had put them there. She added: "In case I get sick, you take care of these papers, and when I die give them to the one who settles up my estate." Soon afterward Mrs. Osborne became ill, and calling Mrs. Davis to her bedside, asked her if she had taken charge of the papers. Mrs. Davis answered: "Yes, I have." Mrs. Osborne said: "All right."

It is evident that when Mrs. Osborne first placed the papers in the hands of her sister in law, she did not intend to surrender her right to the possession and control of them, because, immediately afterward, she took them back into her own hands, and assumed and exercised complete dominion over them. She next put them in a "press," an article of furniture in her own house, presumably belonging to, and used by, her. After placing the package there, she requested her relative, in the event of her illness, to take care of the papers, and, when she, Mrs. O., died, to give them to the one who settled up her estate. Both the will and the deeds were wrapped in a single package, and were together in the "press." The possession and control of Mrs. Davis over the will of Mrs. Osborne were of the same nature and extent as her possession and control over the deeds. She was not informed what the papers were. She was to take care of them in case Mrs. O. became sick. If Mrs. O. died, she was to give the package to Mrs. O.'s executor or administrator.

³⁶² It would seem from the words and actions of Mrs. Osborne that she expected to take care of the papers herself so long as she might be able to do so. She regarded them as valuable documents. To secure them against destruction, loss, or

spoliation at a time when she was unable, on account of sickness to preserve and take care of them, she requested Mrs. Davis to perform that duty for her. When Mrs. Davis took charge of them how did she hold them? Certainly not as a trustee or agent for the grantees. She did not know what the package contained, nor that anyone, excepting Mrs. O., had any interest in it. When she was authorized to take charge of the package, nothing was said to her by Mrs. Osborne which indicated that any other person than herself had any right to the contents of the package, or that she, Mrs. O., intended to relinquish her control over it. If Mrs. Davis held as trustee or agent for the grantees, and if there was a delivery of the deeds for their use, it would have been her duty to retain the deeds for the benefit of the grantees, even if Mrs. O. had demanded them from her. But when her position in the family and her relation to Mrs. O. are considered, it cannot be supposed either that Mrs. O. intended, or that Mrs. Davis understood, that the latter was to detain the package from Mrs. O. if the latter demanded it, or that Mrs. O. relinquished all control over its contents. In making the delivery, both the will and the deeds were included. But can it be supposed that, if Mrs. O. had desired to alter her will, or to destroy it, Mrs. Davis would have felt authorized to keep it from her? If she could not, under her instructions, keep the will, by what word or act of Mrs. Osborne was she clothed with authority to retain the deeds? What was it that Mrs. O. requested her to take care of? It was not deeds, nor a will, but a package. And what was she empowered to do? Simply to take care of it if Mrs. O. should become sick, and, in the event of the death of Mrs. O., to give it to the person who should settle her estate. But what if Mrs. O. recovered ³⁶³ from her sickness? Then, surely, she would have had the right to resume the exclusive possession and control of the package. It is clear that Mrs. Davis was to take care of the papers as the agent and servant of Mrs. Osborne, and that such agency was to continue, unless revoked, during the illness of Mrs. O. She was not authorized to deliver the deeds to the grantees named in them. She was to give the package, containing both the will and the deeds, to the executor of the will, or the administrator of Mrs. O.'s estate.

It does not appear that Mrs. O. was acting under legal advice, and it seems probable that she supposed she could lawfully dispose of her personal estate by will, and divide her real estate among her children by deeds to be placed in the hands of her

executor or administrator. It was doubtless her intention to reserve to herself the possession and control of the deeds so long as she lived. Until her death, they were to remain in her home, in her "press" if she was well, in the hands of her relative if she was sick, but at all times accessible to her, and held in such a situation that she could control, alter, revoke, or destroy them. If she had recovered, would it not have been the duty of Mrs. Davis to replace the papers in the "press," or to return them to the hands of Mrs. O.? Or if, during her sickness, Mrs. O. had said to her relative, "Bring me that package," was there anything in the nature of Mrs. Davis' possession, under her instructions, which would have made it improper for her to do so? We must conclude that Mrs. Osborne never surrendered, or intended to part with, the control of the deeds, and that, in contemplation of law, the possession of Mrs. Davis was that of an agent of Mrs. Osborne, and, therefore, the possession of Mrs. Osborne. But if Mrs. O. retained the possession and control, then there was no delivery, and, if no delivery, then the deeds were not executed for lack of it. Had Mrs. O. requested some friend owning a safe to put her papers in it, and after her death to hand them over to her administrator or executor, it could not ³⁶⁴ have been understood that she thereby placed them beyond her reach, and parted with all control over them. Yet such a disposition of these instruments would not, in legal effect, have differed from that which actually took place in this case.

The ruling English cases and some of the American decisions hold that, in the case of deeds of settlement, manual delivery of the instrument, or the equivalent of such delivery, is not indispensable: *Clavering v. Clavering*, 2 Vern. 473, 476; *Barlow v. Heneage*, Prec. Ch. 211; *Naldred v. Gilham*, 1 P. Wms. 577; *Boughton v. Boughton*, 1 Atk. 625; *Taw v. Bury*, Dyer, 167b; *McLure v. Colclough*, 17 Ala. 89; *Newton v. Bealer*, 41 Iowa, 334; *Shirley v. Ayers*, 14 Ohio, 307, 45 Am. Dec. 546; *Martin v. Flaharty*, 13 Mont. 96, 40 Am. St. Rep. 415, 23 Pac. 287; *Farrar v. Bridges*, 5 Humph. 411, 42 Am. Dec. 439.

But in this state the authorities are uniform that, even in the case of a voluntary deed of settlement, delivery is essential to the validity of the deed, and that it must be made either to the grantee or to some third person for his use. It follows from what has been said that the deeds which were signed and acknowledged by Mrs. Osborne were never delivered, and that they were void for that reason. The conclusions of law in this case were correctly stated by the trial court.

The motion of the appellants to modify the judgment taxing forty dollars of the appellee's attorneys' fees to the appellants, so that no part of such fees be taxed against appellants, should have been sustained. Where parties appear by counsel, and contest a petition for partition, they should not be required to pay the fees of the attorneys of their adversary: *Bell v. Shaffer*, 154 Ind. 413, 56 N. E. 217. And to this extent the judgment should be modified. The court is directed to sustain the motion to modify the judgment as to the taxation and allowance of the fees of appellee's attorneys against the appellants, in conformity with this opinion. In all other respects the judgment is affirmed.

IF THE DELIVERY OF A DEED TO A THIRD PERSON is not unconditional so as to be beyond the grantor's control, the deed is a nullity: *Williams v. Daubner*, 103 Wis. 521, 74 Am. St. Rep. 902, 79 N. W. 748.

THE DELIVERY OF A DEED IS INDISPENSABLE to its validity: *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439. This is true whether the conveyance is for a valuable consideration or is voluntary: See the monographic note to *Jones v. Jones*, 16 Am. Dec. 39. What is a delivery of a deed is the subject of the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 537-556.

HAINES v. WEIRICK.

[155 Ind. 548, 58 N. E. 712.]

CONVEYANCES — RESERVATION OF CONTROL OF PROPERTY.—A condition in a deed reserving to the grantors a life estate, with the absolute control of the real estate the same as if no conveyance had been made, is not inconsistent with the grant of a remainder in fee, since such control relates solely to the use, enjoyment, and management of the land, and does not authorize the life tenants to impair the remainderman's title by another conveyance.

CONVEYANCES—CONSIDERATION—PAYMENT ON BECOMING OF AGE.—Where the consideration for a conveyance of land is to be paid to the grantor's grandson when he becomes of age, such postponement is made solely for the benefit of the debtor; payment is to be made absolutely, and is not conditional on the grandson attaining the age of twenty-one years. Hence, if he dies before reaching such age, his heirs are entitled to recover the amount at the time the grandson would have become of age had he lived.

Summy & Summy and S. J. North, for the appellants.

L. W. Royse, Bertram Shane, and J. W. Cook, for the appellee.

548 DOWLING, C. J. This case was transferred to this court by the order of the appellate court. The suit is for the recovery of a part of the consideration for the conveyance of a tract of land, and is prosecuted by the heirs at law of the deceased payee against the grantee named in the deed. A demurrer to the complaint was sustained, and judgment followed. The error assigned calls in question the ruling on the demurrer.

The facts stated in the complaint are these: December 2, 1885, Henry Weirick and his wife, Elizabeth, executed to the appellee, William H. Weirick, a deed of general warranty for eighty acres of land, situated in Kosciusko county, ⁵⁴⁹ Indiana, reserving to the grantors an estate for the life of each, in said lands; the consideration expressed in the deed was one dollar, and that the grantee should pay to Ora F. Haines, the grandson of the grantor, five hundred dollars, without interest until it should become due, when the said Ora F. should arrive at the age of twenty-one years, a lien to secure such payment being retained in the deed. The grantee accepted the deed, and caused it to be placed upon record. One of the grantors, Henry Weirick, died September 18, 1887, and the said Ora F. Haines died February 25, 1891, not having arrived at the age of twenty-one years. The latter left surviving him as his sole heirs at law his father, Robert Haines, and the other appellants herein, who were his half-brothers and sisters. It is averred that all the debts of the said Ora F. have been paid, and that no administration on his estate is necessary; that the said Ora F., had he lived, would have become twenty-one years old August 16, 1897; that said sum of five hundred dollars is now due and payable to the appellants, as the heirs of the said Ora F., and that the appellee, although requested, refuses to pay the same. Prayer for judgment for the five hundred dollars, with interest from August 16, 1897, and for the foreclosure of the lien reserved in the deed.

It is contended on behalf of the appellee that the reservation of the life estate "with the absolute control of the said real estate, the same as if this conveyance had not been made, for and during the period of the natural life of the grantors, and of each of them," is inconsistent with the grant contained in the instrument, and operates to defeat it. We think otherwise. The deed conveys a fee to the grantee, subject to a life estate in the grantors. During the existence of the life estate, the grantors could, consistently with the grant of a remainder

in fee, continue to exercise absolute control over the land to the same extent as if the deed had not been made. Such control, so reserved in the deed, related to the use, enjoyment, and management of the ⁵⁵⁰ land, and cannot be understood to authorize the life tenants to impair or destroy the title of the grantee and remainderman by another conveyance. Besides, if it were true that the reservation contained in the deed was inconsistent with the estate thereby granted, such reservation would probably be void: 5 Am. & Eng. Ency. of Law, 1st ed., 456; 1 Sheppard's Touchstone, 79.

It is next argued that the five hundred dollars was payable to Ora F. on the condition that he should live until he became twenty-one years old, and that the contingency on which it was to become due and payable having failed by his death, the grantee is not liable to pay it at all. *Cravens v. Eagle Cotton Mills*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981, *Olds Wagon Works v. Coombs*, 124 Ind. 62, 24 N. E. 589, *Henry v. Thomas*, 118 Ind. 23, 20 N. E. 519, 2 *Randolph on Commercial Paper*, sec. 113, p. 153, *Marsh v. Wheeler*, 2 Edw. Ch. 156, *Harris v. Fly*, 7 Paige, 421, *Delavergne v. Dean*, 45 How. Pr. 206, *Knight v. Pottgeiser*, 176 Ill. 368, 52 N. E. 934, *Scofield v. Olecctt*, 120 Ill. 362, 11 N. E. 351, *Carper v. Crowl*, 149 Ill. 465, 36 N. E. 1040, and *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310, are cited in support of this view.

The case is governed by the rules stated in *Goss v. Nelson*, 1 Burr. 226. In that case, the question depended entirely upon the validity of a promissory note given to an infant payable "when he [the infant] shall come of age," and specifying the time when that was to be, viz., the 12th of June, 1750. It was insisted on behalf of the defendant that the notes set forth in the declaration were not notes for the benefit of trade, nor was the money made certainly payable. The note was given to the plaintiff thirteen years before the time when he was to come of age, and it was not at all certain that he would live to attain that age. In order to have the effect of a promissory note within the statute, it ought to be a cash note and payable at all events. In deciding the case, Lord Mansfield said: "It would have been clearly good, if it had been made payable on the 12th of ⁵⁵¹ June, 1750 (that is to say, on a day certain), without mentioning the plaintiff's being then to come of age; and surely it is not the less certain for adding that circumstance. Legacies are of a different nature, and they are determined by different rules. They are directions to the executor to pay;

and in legacies there is a known distinction between the time being annexed to the substance of the gift, or to the payment. If complete words of gift direct the executor to pay, the other words only fix the time of such payment; and then the legacy vests, and is transmissible, though the legatee should die before the day of payment, as a legacy given, 'to be paid at twenty-one.' But if the time is annexed to the substance of the gift, as a legacy 'if,' or 'when,' he shall attain twenty-one, it will not vest before that contingency happens. But here the words of engagement make the debt, and 'tis no direction to another person. The former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is enough if it be certainly and at all events payable at that time, whether he lives till then, or dies in the interim. Therefore, it is a good note, within this remedial statute."

Denison J., concurring, said: "Here is no condition or uncertainty, but it is to be paid certainly, and at all events; only the time of payment is postponed."

Foster, J., concurring, said: "A legacy may be given upon any terms. But upon a promissory note, the time of payment is only for the benefit of the debtor. Here, the time of payment is certainly fixed; and the particular day specified for payment of the money being mentioned to be the day on which the infant is to come of age makes no difference from what it would have been if that circumstance had been omitted."

"And they all agreed that that this was debitum in praesenti, though solvendum in futuro."

The consideration for the conveyance of the land was the ⁵⁵² payment of the five hundred dollars by appellee. The grantor had the right to say to whom that consideration should be paid. Acceptance of the deed by the grantee created a debt in praesenti, and rendered him liable to pay the five hundred dollars agreeably to the terms of the instrument: *Leach v. Rains*, 149 Ind. 152, 48 N. E. 858.

The postponement of the time of payment was not conditional on Ora F. attaining the age of twenty-one years, but was to be made whether Ora F. lived or died. The date at which Ora F. would become of age simply fixed the limit of the credit. The time when the five hundred dollars would become due was as certainly stated and as definitely ascertained as if August 16, 1897, had been inserted. Unless the appellee is liable to pay that sum to the heirs of Ora F., he will get the

land for nothing. It cannot be said that the grantor contemplated such a result.

Judgment reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

DEED.—A CHILD ACQUIRES A VESTED REMAINDER under a deed from his father reserving the use of the premises for the lives of the grantor and his wife, and such remainder is not defeated by a subsequent recovery in a writ of right by a third person against the father, to which the child is not a party: *Brewer v. Hardy*, 22 Pick. 376, 33 Am. Dec. 747. See, further, *Cribb v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610.

MacMURRAY v. SIDWELL.

[155 Ind. 560, 58 N. E. 722.]

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—DIVISION OF ASSETS.—The assets of a building and loan association are the common property of all the stockholders, and the claims upon it are the demands of all the stockholders for a distribution, and where the profits of the association would have been divided in proportion to the investment of the stockholders, the losses, upon insolvency, should be borne by the same persons and in the same proportions.

BUILDING AND LOAN ASSOCIATION—FOREIGN—INSOLVENCY—PREFERENCE OF STOCKHOLDERS.—Where a foreign building and loan association while doing business in a state fully complies with its laws, and upon a change of the law ceases to do business other than to collect dues on stock, and interest and premiums on loans, already in existence, if the association thereafter becomes insolvent, the stockholders in such state have no preferential claim upon the assets found there, since all the stockholders have a common interest in the funds of the association wherever located.

CONTRACTS—VALIDITY—CHANGE OF LAW.—If a contract, which contemplates the lapse of several years before all of its terms are carried out, is valid when executed, it must be held to remain valid and enforceable to the end, no matter what changes the law may undergo in the lifetime of the contract.

James Bingham and Jesse Long, for the appellants.

G. H. Koons, H. F. Wilkie, and Henrietta Wilkie, for the appellee.

⁵⁶⁰ **BAKER, J.** On May 14, 1898, in a suit begun in the Delaware circuit court by Charles and Eudora Ticknor against

the National Home, Building, and Loan Association, organized and existing under the laws of Illinois and having its home office at Bloomington, Illinois, the association was found to be insolvent and appellant Francis James was appointed receiver of its assets in Indiana. On May 19, 1898, in a suit pending in the circuit court of the United States for the southern district of Illinois, the association was found to be insolvent, and appellant James E. MacMurray was appointed receiver of all its assets save those in Indiana. Thereafter and during May, 1898, Mr. MacMurray was appointed ancillary receiver by the circuit courts of the United States for the various districts in which the association had done business. On October 16, ⁵⁶¹ 1899, appellee, Andes M. Sidwell, a stockholder of the association who resides in this state, on behalf of himself and all other Indiana stockholders, filed a petition in the receivership case pending in the Delaware circuit court, asking the court to order Mr. James to pay the Indiana stockholders in full from the Indiana assets and pay the balance only to Mr. MacMurray. Thereupon Mr. MacMurray obtained an order from the circuit court of the United States for the southern district of Illinois, directing him to intervene in the cause in the Delaware circuit court. By leave of the Delaware circuit court Mr. MacMurray and Mr. James, as receivers, filed an intervening petition, asking, among other things, that the Indiana assets be added to the other assets and that the whole be distributed equally among all the stockholders in proportion to their payments on stock. Mr. Sidwell, on behalf of himself and all other Indiana stockholders, was permitted to file a demurrer to the receivers' petition for want of facts. The court sustained the demurrer, and, on the receivers' refusal to plead further, entered judgment that they take nothing by their petition. The court granted the receivers' prayer for an appeal to this court.

The material facts in the petition are these: The association was organized in February, 1890, under the statutes of Illinois. The statutes, the association's charter, and its by-laws are set forth. The charter and by-laws are similar in scope to those of associations organized in this state. The statutes, in spirit, are the same as Indiana's. The association was formed to do a "building and loan" business, which, as Endlich says, "in its essential plan and nature is the same all over the world." It transacted business in various states until the appointment of the receivers. There are no general creditors. The claimants

in all the states are stockholders. At the time of the appointment of the receivers the total claims amounted to \$579,388⁵⁶² and the appraised value of all the assets to \$376,640. In some of the states the assets exceeded the claims. In the greater number of them the claims exceeded the assets. In Indiana the assets were \$79,625 and the claims \$54,329. The assets consisted of evidences of loans and of real estate obtained in collecting loans. The loans were all made at the home office in Bloomington, Illinois. The Indiana assets originated from loans from a common fund created by proportionate contributions of all stockholders regardless of state lines. On entering Indiana in 1890 the association complied with the foreign corporations act of 1852 by filing in each county the required certificates of agents' authority and of the association's consent to be sued by process served on Indiana agents. The association did not make the deposit required by the foreign building and loan associations act of 1893, which came into force on May 18, 1893. After April 1, 1893, the association made no new contracts, issued no new shares, executed no new loans, in Indiana; and did no business in the state other than to collect dues on stock, and interest and premium on loans, already in existence. Mr. James has over \$20,000 on hand in cash. Mr. MacMurray has in his hands all of the assets of the association except those in Indiana, and all the claims of stockholders except of Indiana stockholders. In directing Mr. MacMurray to intervene in the Delaware circuit court, the circuit court of the United States for the southern district of Illinois entered an order indicating the plan of distribution that would be carried out if possible, namely, that the two courts should co-operate to the end that there be one and a harmonious administration of the estate by distributing all the assets wherever collected among all the stockholders wherever resident, and that if Mr. James be ordered from time to time to turn over to Mr. MacMurray the net proceeds of Indiana assets Mr. MacMurray shall treat the claims of Indiana stockholders approved by the Delaware circuit⁵⁶³ court as adjudicated claims, and that Indiana stockholders shall receive the same distributions, according to the respective amounts paid in by them on stock, as are received by the stockholders of any other state.

This association was a co-operative enterprise. It dealt only with its own members. It was a corporate copartnership, so to say. Mutuality and equality were its essential working principles. Every stockholder, whether in Indiana or another state,

contributed to a fund in which all had interests in common. If the enterprise had been successful, all would have received dividends proportionate to their investments as stockholders. On insolvency, the assets should be distributed according to the nature and source of the fund and of the claims upon it. The fund is the common property of all the stockholders, and the claims upon it are the demands of all the stockholders for a distribution. The loss should be borne by those who would have shared the profits, and in the same proportions: *Marion Trust Co. v. Trustees Edwards Lodge*, 153 Ind. 96, 54 N. E. 444; *Huter v. Union Trust Co.*, 153 Ind. 204, 54 N. E. 755; *James v. Sidwell*, 153 Ind. 697, 54 N. E. 752.

The doing of a building and loan business in Indiana, whether by a domestic or a foreign association, contravenes neither the statutes nor the public policy of this state: *Security Sav. Assn. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *International Bldg. Assn. v. Wall*, 153 Ind. 554, 55 N. E. 431; *Equitable Loan Assn. v. Peed*, 153 Ind. 697, 54 N. E. 1096; *National etc. Loan Assn. v. Black*, 153 Ind. 701, 55 N. E. 743; *United States etc. Loan Co. v. First Methodist Church*, 153 Ind. 702, 55 N. E. 743. This association, in entering the state in 1890 and in continuing to do business until April 1, 1893, complied with the statutes then in force. There is no merit in appellee's suggestion that it was against public policy to admit this association because the Illinois statutes authorized a larger capitalization than did the Indiana statutes. It is the nature and not the size of a business that determines its legality. The association did not make the deposit required by the act of 1893: *Acts 1893*, p. 274; ⁵⁶⁴ *Burns' Rev. Stats. 1894*, secs. 4464-4483; *Horner's Rev. Stats. 1897*, secs. 3420v-3420oo. Regarding this act it was said in *Security Sav. Assn. v. Elbert*, 153 Ind. 198, 54 N. E. 753: "The act of 1893, declaring that it shall be unlawful for a foreign corporation to do a building and loan business in this state until it shall have deposited bonds, etc., must be read prospectively, if possible—must be read as not impairing the obligation of existing contracts, to be constitutional. To meet these requirements the act must be construed to mean that the business which may not lawfully be done until the terms imposed are complied with is the making of new contracts, the issuance of new shares, the execution of new loans. If a contract is valid when executed, which contemplates the lapse of several years before all of its terms are carried out, it must be held to remain valid and enforceable to the end, under the

law in force at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract." The petition shows that the association, under the foregoing interpretation of the act of 1893, did no business in Indiana after the act went into effect. On the taking effect of the act, the association was under no legal nor moral obligation either to the state or to its stockholders in Indiana to make the deposit. The association had the option either to quit business in the state or to make the deposit and continue. To hold that the association, by deciding to quit, forfeited its right to collect what was coming to it on business already done, would work or at least tend to work a confiscation of its property. The case of *Lewis v. American Sav. Assn.*, 98 Wis. 203, 73 N. W. 793, wherein it was held that Wisconsin stockholders had a preferential claim upon the deposit made by a foreign building and loan association, is not in point, because here the association elected to quit and not to make the deposit. Neither is the question involved as to what would be the rights of Indiana stockholders (or those who might have become stockholders after the taking effect of the act) to a ⁵⁶⁵ preferential claim upon the assets sequestered in this state, if the association, in defiance of the act, had continued to do business in this state after May 18, 1893. On the facts stated in the petition, the Indiana stockholders have no preferential claim upon the Indiana assets.

This court cannot formulate the orders that the Delaware circuit court should make from time to time, and can only indicate the general lines upon which that court should proceed. Mr. James should continue to convert the Indiana assets into money. He should report his collections and disbursements and all his doings to the Delaware circuit court for approval. All expenses of the Indiana receivership, including the costs of this appeal, should be paid from the Indiana assets under the court's orders. Indiana stockholders should not be put to the trouble and expense of proving their claims in Illinois. The Delaware circuit court should see to it that the Indiana stockholders receive the same returns from the total assets that are received by stockholders of other states, and no more. To this end the Delaware circuit court should co-operate with the circuit court of the United States for the southern district of Illinois. The Indiana receivership is the elder. But Mr. MacMurray is receiver at the insolvent's domicile. As Mr. MacMurray has all the assets and claims except those in Indiana,

it is suitable that distribution of the total assets to all stockholders should be made through him under orders of the court of his appointment. Mr. James should be ordered from time to time to turn over to Mr. MacMurray the net proceeds of the Indiana assets, in order to enable Mr. MacMurray to make general distributions to all stockholders. The Delaware circuit court should exercise its discretion as to the times when and the conditions on which these orders shall be made, so that Indiana stockholders will be fully protected in their rights as herein declared. In brief, it is only by distributing all the assets among all the stockholders that equity can be done, and this is the guiding principle. In a ⁵⁰⁰ situation like the present one, comity requires that the court of the insolvent's domicile have the lead: *Cowen v. Failey*, 149 Ind. 382, 49 N. E. 270; *Durward v. Jewett*, 46 La. Ann. 559, 15 South. 386; *Ware v. Supreme Sitting of Iron Hall (N. J. Eq.)*, 28 Atl. 1041; *Buswell v. Supreme Sitting of Iron Hall*, 161 Mass. 224, 36 N. E. 1065; *Baldwin v. Hosmer*, 101 Mich. 119, 59 N. W. 432; *Relfe v. Rundle*, 103 U. S. 222; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165; *Blake v. McClung*, 176 U. S. 59, 20 Sup. Ct. Rep. 307; *Sully v. American Nat. Bank*, 178 U. S. 289, 20 Sup. Ct. Rep. 935; *Taylor v. Life Assn. of America*, 13 Fed. 493; *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. 305; *Failey v. Talbee*, 55 Fed. 892; *Maynard v. Granite State Provident Assn.*, 92 Fed. 435; 34 C. C. A. 438.

Judgment reversed, with instructions to overrule the demurrer to the petition and to proceed not inconsistently with this opinion.

BUILDING AND LOAN ASSOCIATION.—The effect of the insolvency of a building and loan association on the rights and liabilities of its members is the subject of the monographic note to *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 24-30. Each member of a building and loan association shares in the common gains, and must bear a proportionate share of the losses. On insolvency, the rights of the members are the same. None can be paid to the exclusion of others, nor exempted from sharing ratably in the losses and liabilities: *Leahy v. National etc. Assn.*, 100 Wis. 555, 69 Am. St. Rep. 945, 76 N. W. 625.

CONTRACT—CHANGE IN LAW.—A contract cannot be rendered invalid by a subsequent statute: *Stephens v. Southern Pac. R. R. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783.

CASES
IN THE
SUPREME COURT
OF
IOWA.

PETERSON v. KOCH.

[110 Iowa, 19, 81 N. W. 100.]

JUDGMENTS — VACATING — UNAVOIDABLE CASUALTY.—A person who employs and pays counsel to make his defense has a right to rely upon his attorney to inform him as to the time of trial or of anything required of him for the purpose of defense, and the failure of such attorney to inform him of the time of trial, or to appear when the case is called for trial, is an "unavoidable casualty," which entitles him to a vacation of the judgment rendered by default, and to a new trial.

D. A. Wynkoop and J. Hilsinger, for the appellant.

L. A. Ellis and W. C. Gregory, for the appellee.

10 GIVEN, J. 1. The facts necessary to be noticed are as follows: At the June term, 1894, the defendant, a brother ²⁰ of J. F. Koch, deceased, presented what purported to be the last will and testament of said deceased to said court for probate. The plaintiff and her sister, Caroline M. Eskelsen, grandchildren of the deceased, and children and heirs at law of his daughter, Catherine Lange, deceased, employed two attorneys practicing in said court to appear for them, and resist the probating of said will. Said attorneys appeared, and on June 4, 1894, filed exceptions to the probating of said instrument on the ground of mental incapacity of the said J. F. Koch, deceased, to make said will. At the November term, 1894, to wit, November 9th, the case was reached in its order for trial, and tried, no one appearing for said contestants, and an order entered admitting said instrument to probate as the last will and testament of said J. F. Koch, deceased. On January

4, 1895, this plaintiff filed her petition to set aside said order on the grounds of mental incapacity, fraud, duress, and undue influence, and on January 8, 1896, she filed an amended and substituted petition, further alleging that by mistake, accident, and unavoidable casualty neither plaintiff nor her attorneys were present when said case was called for hearing and heard, and asking that said order be set aside, and that she be heard upon her exceptions to the probating of said will. The defendant answered, joining issue on the allegations of incapacity, fraud, duress, and undue influence, and upon the allegations of mistake, accident, and unavoidable casualty. The record shows as follows: "This case is tried only so far as the right of the plaintiff to have the order or judgment of the court admitting the will in question to probate vacated or set aside. All questions as to competency to make the will or the validity of the will in question remain untried." Upon the hearing had on February 17, 1898, judgment was rendered setting aside and vacating said order admitting said will to probate, and it is from this judgment that the defendant appeals.

21 2. Section 4091 of the code provides that the district court in which a final judgment or order has been rendered "may, after the term at which the same was rendered or made, vacate or modify the same or grant a new trial for unavoidable casualty or misfortune preventing the party from prosecuting or defending." The facts relied upon by the plaintiff as showing unavoidable casualty and misfortune preventing her from defending against the probating of said will are, in substance, these: She and her sister, being the grandchildren and next of kin of the testator, and entitled in law, in the absence of a will, to inherit from said testator, employed attorneys, as already stated, to resist the probating of said will, and paid them a retainer fee of one hundred dollars. Being unfamiliar with proceedings in court, and the times of the terms of court, and residing distant from the county seat, the plaintiff and her sister, as they had a right to do, relied upon said attorneys to represent them at all times in the case, and to inform them of the time at which it would be called for trial. So far as appears, said attorneys did nothing more in the case than to file the exceptions on behalf of the contestants to the probating of the will. Though at the time practicing in that court, they did not appear at the trial, nor inform their clients of the time of the trial, or that they would not appear and defend. Many cases are cited to the effect that negligence of one's attorney is

not a ground for new trial. An examination of the cases cited shows that negligence, whether of the party or of counsel, is not a ground for new trial, and that the client is only held chargeable with the negligence of his attorney when that negligence may be imputed to him; or, in other words, when, by the exercise of care on his part, he would have avoided the consequences of the negligence of his attorney. In *State v. Elgin*, 11 Iowa, 216, cited by appellant, it is said that: "The forgetfulness and carelessness of counsel are the substance of the excuse for the failure of the defendant to plead. We do ²² not regard the showing as sufficient to justify us in interfering with the ruling of the court; more especially do we feel disposed not to reverse the judgment for this reason, as we do not think that the affidavits showed that the defendant had any defense to the plaintiff's right to recover." In *Jones v. Leech*, 46 Iowa, 186, cited and relied upon by appellant, the ground for new trial was that the attorney had negligently and fraudulently failed to take testimony and appear and defend at the trial. This negligence might fairly be imputed to the client, as, by the exercise of diligence, he would have known of the failure to take testimony and prepare for defense. It is said: "The law regards the negligence of an attorney as the client's own neglect, and will give no relief from the consequences thereof. Abstractly speaking, this is correct, but if the negligence of the attorney is not such as may be imputed to the client, and is such as to cause unavoidable casualty or misfortune, preventing the client from prosecuting or defending, it is ground for new trial." In *Grove v. Bush*, 86 Iowa, 95, 53 N. W. 88, the ground for new trial was the failure of plaintiff's attorney to appear in the case at the proper time because of a misapprehension as to when the case would be called, and his engagements elsewhere. It is said: "Parties are required to be diligent in the preparation of their case for trial," and it was held under the facts of that case "that he has failed to show sufficient diligence to entitle him to a new trial." The conclusion is based, somewhat at least, upon the fact that there was a failure upon the part of the plaintiff to exercise diligence. In *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 338, the failure to appear and defend resulted solely from the neglect of one of the counsel, through forgetfulness, to inform his partner of their employment, and as to the status of the case. It was held that this neglect was not, under our statute, ground for granting the relief asked. In *Ordway v. Suchard*, 31 Iowa, 481, it was held that the ac-

cidental misplacement of the petition and notice by the attorneys, whereby the party was prevented ²³ from defending, was an accident, for which a new trial should be granted. So far as the question under consideration is concerned, this case is identical in its facts with that of *Ennis v. Fourth Street etc. Assn.*, 102 Iowa, 520, 71 N. W. 426, except that in that case the attorney had absconded before the trial. In employing and paying counsel as they did, these contestants had done all that could be expected of them with a view to the making of their defense. They had a right to rely upon their attorneys to inform them as to the time of the trial, or as to anything that might be required of them for the purpose of defense; therefore it cannot be said that they were negligent in failing to defend. They had no reason to anticipate the failure of their attorneys to attend to the case, and therefore the negligence of the attorneys cannot be imputed to them. It has been said, as we have seen, that mere negligence of the party or his attorney is not ground for new trial under our statute, but the question is whether, where the failure to defend is attributable to the negligence or bad faith of the attorney, unavoidable casualty or misfortune has arisen as to the party, preventing him from prosecuting or defending. We think the facts of this case bring it within the rule announced in *Ennis v. Fourth Street etc. Assn.*, 102 Iowa, 520, 71 N. W. 426, that the failure of plaintiff's counsel to appear and defend, being a failure which plaintiff had no reason to anticipate or to provide against, was an unavoidable casualty and misfortune that entitles her to have the order probating the will set aside, and to be heard upon her exceptions.

Affirmed.

Granger, J., not sitting.

Negligence or Inadvertence of Attorney as Ground for Relief from Judgment.

Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct, or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence, or neglect attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client: *Spaulding v. Thompson*, 12 Ind. 477, 74 Am. Dec. 221; *Tharp v. Moffitt*, 94 Ind. 240; *Brumbaugh v. Stockman*, 83 Ind. 583; *Indianapolis*

etc. Ry. Co. v. Hood, 130 Ind. 594, 30 N. E. 705; Moore v. Horner, 146 Ind. 287, 45 N. E. 341; Heaton v. Peterson, 6 Ind. App. 1, 31 N. E. 1133; Smith v. Tunstead, 56 Cal. 175; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Harper v. Mallory, 4 Nev. 447; Welch v. Challen, 31 Kan. 696, 3 Pac. 314; Clark v. Ewing, 93 Ill. 572; Metropolitan Life Ins. Co. v. Bergen, 64 Ill. App. 685; Rawley v. Murray, 69 Ill. App. 428; Scott v. Wright, 50 Neb. 849, 70 N. W. 396; Thomas v. Chambers, 14 Mont. 423, 36 Pac. 814; Roberts v. Allman, 106 N. C. 391, 11 S. E. 424; Merritt v. Putnam, 7 Minn. 493; State v. Elgin, 11 Iowa, 216; Jones v. Leech, 46 Iowa, 186; Myers v. Landrum, 4 Wash. 762, 31 Pac. 33.

A party may be held excusable for relying upon the diligence of counsel, who has been neglectful, only when it appears that he himself has not been neglectful, but has given all proper attention to the litigation: Manning v. Roanoke etc. R. R. Co, 122 N. C. 824, 28 S. E. 963. Mere neglect of an attorney to defend a suit will not discharge his client from the judgment obtained by default in the absence of fraud: Matthis v. Cameron, 62 Mo. 504.

It is no excuse for an appellant's failure to file a remonstrance before a board of highway commissioners that his attorney was negligent, as the negligence of the attorney is the negligence of the client: Indianapolis etc. Ry. Co. v. Hood, 130 Ind. 594, 30 N. E. 705. Although a defendant may have a meritorious defense to an action, the mere neglect of his counsel to file an answer in time, which neglect is neither explained nor excused, is not ground upon which a judgment by default may be vacated: Thomas v. Chambers, 14 Mont. 423, 36 Pac. 814. It is generally held that no relief from a default judgment can be had because of the failure of counsel to plead. Thus, a default will not be opened because the attorney had prepared a demurrer but had failed to file it by reason of his miscalculation of the time when it was due: People v. Rains, 23 Cal. 127. Failure of defendant's attorney to put in an answer in time is generally such neglect on his part that it cannot be excused in order to entitle the defendant to have the judgment, taken for want of such answer, set aside or reopened: Dick v. Williams, 87 Wis. 651, 58 N. W. 1029; East St. Louis v. Thomas, 102 Ill. 453; Bast v. Van Osdol, 75 Ind. 186; Bailey v. Taaffe, 29 Cal. 423; Williamson v. Cummings etc. Co., 95 Cal. 652, 30 Pac. 762; Schultz v. Meiselbar, 144 Ill. 26, 32 N. E. 550; White v. White, 169 Mass. 52, 47 N. E. 499; Butler v. Morse, 66 N. H. 429, 23 Atl. 90, wherein it was said that the only ground relied upon for vacating the decree and judgment of foreclosure is the neglect of petitioner's counsel in that suit to file an answer setting up a partial failure of consideration in the mortgage debt. Whether the failure to do this occasioned any injustice to the petitioner it is unnecessary to determine, because the neglect of the attorney must be regarded as the neglect of the petitioner himself. When a party selects an attorney of the court to conduct his case in his stead and place, he confers upon the attorney

authority to take such action in its prosecution or defense as he may decide to be legal, proper, or necessary in the management of the cause; his acts are, in the absence of fraud, the acts of his client, and the rule that a party cannot in equity find relief from the consequences of his own negligence is equally applicable where the neglect is that of his attorney, employed in the management of the case: *Butler v. Morse*, 66 N. H. 431, 23 Atl. 90. And to the same effect *Noye Mfg. Co. v. Wheaton Roller Mill Co.*, 60 Minn. 117, 61 N. W. 910; *Bonnifield v. Thorp*, 71 Fed. 924. Failure of defendant's attorney to act in any manner, or even file an appearance, is not such excusable neglect as entitles to relief: *Winston v. Western etc. R. R. Co.*, 95 N. C. 385.

Some cases are found, however, where the neglect of the attorney to plead was excused. Thus, in *Taylor v. Pope*, 106 N. C. 267, 19 Am. St. Rep. 530, 11 S. E. 257, it was held that a judgment by default was properly set aside on the ground of excusable neglect, when such judgment was entered through the failure of counsel to enter a plea for defendant, after being employed and left in attendance upon the court. Counsel's laches as to his duty to enter an appearance and file proper pleadings cannot, in such case, be attributed to the defendant to his prejudice. To the same effect *Searles v. Christensen*, 5 S. Dak. 650, 60 N. W. 29. A default for not pleading may be opened, when it is suffered by the neglect of the attorney, who is insolvent: *Meacham v. Dudley*, 6 Wend. 514. Or, if he is, by his habits, rendered incompetent to take charge of the case and wholly neglects all proceedings therein: *Elston v. Schilling*, 7 Robt. 74. Where defendant resides at a long distance from the place of trial, has retained an attorney to represent him, and has furnished him with the facts necessary for his answer, but the attorney fails to make proper defense by answer, or to notify the defendant that his presence is necessary at the trial, and judgment by default for want of answer is entered, the defendant is entitled upon a proper showing to have the judgment set aside, as, in such case, the neglect of the attorney is not that of the client: *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661; *Heardt v. McAllister*, 9 Mont. 405, 24 Pac. 263. If an attorney fails to appear and file an answer because he has accidentally misplaced the petition and notice, whereby the case is overlooked by him, and judgment taken by default, it has been held that the client of such attorney is entitled to have the default judgment vacated. This, we think, is the limit of liberal discretion, but such is the ruling in *Ordway v. Suchard*, 31 Iowa, 481. That an attorney while busily engaged in drawing an answer is called away to another county to attend court, where he is detained until after a default judgment has been entered, has also been held as an excuse, for which such judgment might be set aside: *Horton v. New Pass etc. Co.*, 21 Nev. 184, 27 Pac. 376, 1018.

If a defendant employs a firm of attorneys to defend his suit, and the partner with whom the arrangement is made leaves the place

of trial temporarily, or is engaged in another court, or from other cause is unable to attend to the case himself, and inadvertently neglects to notify his copartner of the employment of the firm, and as a result judgment by default is taken, such facts constitute no ground for setting such judgment aside, as in such case the rule that the negligence of the attorney is the negligence of the client applies, and the court is always warranted in enforcing it, unless it clearly appears that the default and judgment will work gross injustice to the defendant: *Metropolitan Life Ins. Co. v. Bergen*, 64 Ill. App. 685; *Heaton v. Peterson*, 6 Ind. App. 1, 31 N. E. 1133; *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N. W. 98.

Failure of the attorney employed to appear and defend the case is generally such neglect as precludes the client from any relief from the judgment taken by default, on the principle that the negligence of an attorney at law in failing to avail himself of a defense to an action at law or to appear for his client is the negligence of the client, and bars relief in equity, whether the attorney is insolvent or not: *Athens Leather Mfg. Co. v. Myers*, 98 Ga. 396, 25 S. E. 503; *Phillips v. Collier*, 87 Ga. 66, 13 S. E. 260. Thus, if a person, when sued with another, relies solely upon the promise of his codefendant, who is also an attorney at law, to take care of his interests and appear and make defense for both, and long thereafter the action is dismissed as to such codefendant, and judgment entered by default against the other, the latter cannot, without having taken any other steps to present his defense, enjoin the collection of the judgment. In such case the negligence of his codefendant is the negligence of himself: *Bardonski v. Bardonski*, 144 Ill. 284, 33 N. E. 39.

The failure of an attorney, who has filed an answer and promised to defend a case, to appear at the trial and present his defense is no ground for setting aside the judgment: *Woolley v. Sullivan*, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629. An attorney is presumed to know the rules of the court in which he appears, and his absence from the trial because of want of such knowledge is not such excusable neglect as to authorize relief from the judgment: *Brooks v. Johnson*, 122 Cal. 569, 55 Pac. 423. A party defaulted by reason of his attorney's forgetting the day of trial, or forgetting to inform his partner of the day of trial in his absence, furnishes no ground for relief by the client. Such case is one of pure negligence on the part of the attorney, and must be regarded as the negligence of the client: *Babcock v. Brown*, 25 Vt. 550, 60 Am. Dec. 290; *Davidson v. Heffron*, 31 Vt. 688; *Baltimore etc. R. R. Co. v. Flinn*, 2 Ind. App. 55, 28 N. E. 201; *Church v. Lacy*, 102 Iowa, 235, 71 N. W. 338. If an attorney is notified that a case is set for trial on the day previous thereto, and he does not attend, and judgment is taken by default, such default will not be set aside in the absence of a showing that he has made preparation for the trial, that he has had no time for that purpose, or that he has made reasonable application to the court for delay: *Rawley v. Murray*, 69 Ill. App. 428. If a plaintiff has two counsel employed to



represent him, the absence of his leading counsel without leave when the case is regularly called for trial does not entitle the client to have the judgment against him set aside, if one of his counsel is present when the case is disposed of, and he makes no motion for a continuance because of the absence of the leading counsel, or upon any other ground: *Parker v. Belcher*, 87 Ga. 110, 13 S. E. 314. The neglect of the attorney employed in the case in not being present in court on the day of and at the time of trial because of business at that time in another court, or because of urgent business elsewhere at the time, is not generally excusable so as to entitle the client to relief from the judgment. Thus, where a case comes on for trial in its regular order, under the rules of the court in which it is at issue, at a time when counsel, being engaged elsewhere, and owing to a different rule in an adjoining circuit, does not expect it to come on, and in consequence of which he is not present at the trial, this is no ground for a new trial, in the absence of misrepresentations or bad faith on the part of counsel on the other side: *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339, 11 S. W. 233. The fact that counsel had business of a professional nature in two courts on the same day, and was absent from one under a mistaken belief that he had leave of absence to attend business in the other, is no cause for setting aside a judgment rendered in his absence: *Western etc. R. R. Co. v. Pitts*, 79 Ga. 532, 4 S. E. 921. Absence of an attorney at the time of trial is not ground for relief, even though he is professionally engaged in another court at the time, and has informed the opposing counsel that such would be the condition of affairs at that time: *Claussen v. Johnson*, 32 S. C. 86, 11 S. E. 209. Or if counsel writes to the opposing attorney requesting a continuance, and before receiving an answer leaves his place of business on other business and cannot be found in time to receive information that a continuance would not be consented to, his neglect is inexcusable, and a judgment by default taken in his absence will not be vacated: *Lowell v. Ames*, 6 Mont. 187, 9 Pac. 826.

The fact that counsel was very busy with other professional matters or other business at the time of trial is not ground for relief from a judgment by default granted by reason of the absence of such counsel: *Bonnifield v. Thorp*, 71 Fed. 924; *Hevick v. St. Louis etc. Assn.*, 22 Mo. App. 629. Or such fact, coupled with the fact that the attorney was also embarrassed by attention upon members of his family, who were ill, is no sufficient excuse for the neglect of such attorney in not being present at the trial, or having some one represent him: *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135. Nor is the fact that defendant's attorney was engaged in other business at the time of the hearing, and that a settlement thereof was expected, sufficient reason for relief: *Dick v. Williams*, 87 Wis. 651, 58 N. W. 1029. If a defendant, knowing that his case stands for trial at a certain term of court, fails to be present at the time of trial, the failure of his counsel to attend, or to notify him of the

day of trial, although he lives at a great distance, is not ground for relief. In such case the neglect of the counsel is the neglect of his client: *Cobb v. O'Hagan*, 81 N. C. 293. And the same result follows if both counsel and client depend on a third attorney to notify them of the time of trial and he neglects to do so: *Jackson v. Woodruff*, 57 Ark. 600, 22 S. W. 566.

Many cases are found, however, where the failure of the attorney employed to attend the trial caused by his inadvertence, mistake, or engagement elsewhere at the time, or his absence from some other cause, has been considered by the court sufficient ground for reopening the judgment rendered by default because of such absence. In such case, though the attorney may have been guilty of neglect, such neglect has been excused on various grounds. Thus, if through some oversight or inadvertence counsel has failed to notice that a case was on the calendar for trial on a certain day, during the whole of which he was actively engaged in another courtroom, a judgment rendered by default upon an amended complaint may be set aside, especially when an answer setting up a good defense to the original answer was on file in the court: *Hermance v. Cunningham*, 49 Neb. 897, 69 N. W. 311. A default inadvertently permitted by a party having a substantial defense, through the mistake of his attorney in calculating the time allowed him in which to file an answer under the peculiar circumstances of the case, presents a case in which great latitude should be exercised in setting the judgment aside, though the attorney is guilty of neglect: *Harbaugh v. Honey Lake etc. Co.*, 109 Cal. 70, 41 Pac. 792. And if defendant's attorney wrongfully declines to file an answer which he has in his possession, disclosing a meritorious defense, and refuses to appear at the trial or take further action, and suffers the case to go by default before the defendant is informed or can act in the matter, such default should be set aside: *Simpkins v. Simpkins*, 14 Mont. 386, 43 Am. St. Rep. 641, 36 Pac. 759. If a case is called for trial contrary to the terms of an agreement between opposing counsel, and in the absence of the party or his attorney, a default entered in such case should be set aside and a new trial granted: *Council Bluffs etc. Co. v. Jennings*, 81 Iowa, 470, 46 N. W. 1006.

It seems that a very much wider discretion may be exercised in divorce than in other cases, and that any inadvertence which prevents the attorney for the party defaulted from appearing is such excusable neglect as entitles him or her to relief: *Wadsworth v. Wadsworth*, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648. A judgment by default obtained during the absence of a party and his attorney from the trial, due to the excusable mistake of the attorney as to the time set for the trial, may be set aside in the discretion of the court: *Dougherty v. Nevada Bank*, 68 Cal. 275, 9 Pac. 112; *Pearson v. Drobaz Fishing Co.*, 99 Cal. 425, 34 Pac. 76. Failure to reach the place of trial in time for the trial, caused by the delay of a railroad train, is excusable neglect entitling the party defaulted to re-

lief: *Yetzer v. Martin*, 58 Iowa, 612, 12 N. W. 630; *Fulweiler v. Hog's Back Min. Co.*, 83 Cal. 126, 23 Pac. 65; *Omro v. Ward*, 19 Wis. 249. The contrary rule was maintained in *Caughey v. N. P. Elevator Co.*, 51 Minn. 324, 53 N. W. 545, where it was held that a railroad wreck was not sufficient excuse for nonattendance at the trial, if the attorney might have informed the court by telegram of his delay and thus obtained a postponement of the trial. If the attorney miscalculates the progress of the court's business to the extent of twenty minutes, and the case is taken up out of order and a default entered, the party defaulted is entitled to present his defense on the ground of the excusable neglect of the attorney: *Slack v. Casey*, 22 Ill. App. 412. If the attorney is informed by the clerk of the court that no business is to be transacted by the court until after a certain date, and such attorney, relying upon such statement does not appear, and judgment is taken by default when the case is called for trial before such date, the negligence of the attorney is excusable, and the default may be set aside: *Anaconda Min. Co. v. Saille*, 16 Mont. 8, 50 Am. St. Rep. 472, 39 Pac. 909. If the attorney is negligent and such neglect is caused by the failure of the clerk of court to notify him of the date set for the trial, as he is required by the rules to do, the neglect is excusable, and a judgment by default because of the nonappearance of such attorney will be vacated: *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181. An unforeseen accident of a serious nature happening to the attorney or to his immediate relative is sometimes sufficient to excuse his nonattendance to a case intrusted to him, especially where he has a good defense which he is thereby prevented from presenting. Thus, where the attorney while engaged in drawing an answer in a case for his client receives a telegram that his brother has been shot and dangerously wounded, and he at once goes to his relief, where he is compelled to stay several days, this is sufficient to excuse his neglect in failing to file his answer in time: *Burns v. Scooffy*, 98 Cal. 271, 33 Pac. 86; and the same rule applies where the attorney, under similar circumstances, is called away to attend the funeral of his mother in law, and judgment by default is taken in his absence: *Green v. Stobo*, 118 Ind. 332, 20 N. E. 850. Sickness of the attorney or of an immediate member of his family, whereby he is prevented from pleading or attending the trial and presenting his defense, is generally such inadvertence, unavoidable casualty, or misfortune, or a failure to attend to the case for this reason is such excusable neglect that the party may subsequently have the judgment rendered against him opened or vacated: *Stout v. Lewis*, 11 Mo. 438; *Hill v. Crump*, 24 Ind. 291; *Bristor v. Galvin*, 62 Ind. 352; *Snell v. Iowa Homestead Co.*, 67 Iowa, 405, 25 N. W. 678; *Wishard v. McNeill*, 78 Iowa, 40, 42 N. W. 578; *Callanan v. National Bank*, 84 Iowa, 8, 50 N. W. 69; *Harraison v. McArthur*, 87 Ga. 478, 13 S. E. 594; *Nye v. Swan*, 42 Minn. 243, 44 N. W. 9. The sickness of the attorney's wife is an excuse for his neglect in not attending to the case, and entitles his client to re-

Relief: *Leaming v. McMillan*, 59 Ark. 162, 43 Am. St. Rep. 26, 26 S. W. 822; *Hill v. Crump*, 24 Ind. 291. The prevalence of smallpox in the town where the courthouse is situated has also been held ground upon which to excuse the neglect of the attorney in not attending the trial on the day when it was set for hearing: *Bank of Princeton v. Johnston*, 41 W. Va. 550, 23 S. E. 517. It has been held, however, that the sickness of counsel when the time to plead or to attend the trial has been extended, which is known to the client in time that he might have employed other attorneys, furnishes no ground for equitable relief against a judgment, taken by default: *Clark v. Ewing*, 93 Ill. 572; *Haggin v. Lorentz*, 13 Mont. 406, 34 Pac. 607. Under such circumstances the illness of a child of the attorney's is not ground for relief: *Cresswell v. White*, 3 Ind. App. 306, 39 N. E. 612.

INDEPENDENT SCHOOL DISTRICT v. HUBBARD.

[110 Iowa, 58, 81 N. W. 241.]

PUBLIC OFFICERS—SURETIES—EVIDENCE OF INDEBTEDNESS.—Books of account kept, and reports and statements made, by a public officer in his official capacity concerning the receipts and expenditures of his office are admissible as evidence of his indebtedness against him and his sureties.

PUBLIC OFFICERS—SETTLEMENT—CONCLUSIVENESS. If a re-elected public officer makes an official settlement of his accounts, and produces the funds in his control before his bond is approved, as required by statute, such settlement is conclusive, in the absence of fraud or mistake, and no inquiry can be made as to the source of the necessary funds.

PUBLIC OFFICERS—SETTLEMENT—SURETIES FOR SECOND TERM—ESTOPPEL.—If funds in the control of a re-elected public officer are not actually produced on his settlement for his first term before the approval of his bond, as required by statute, his sureties are not estopped from showing that a defalcation, for which they are sought to be charged, in fact occurred prior to the making and approval of their bond.

PUBLIC OFFICERS—SETTLEMENT—SURETIES FOR SECOND TERM—BURDEN OF PROOF.—If a re-elected public officer has made an official settlement for his first term before the approval of his official bond for his second term, as required by statute, the burden of proof is on his sureties to show a failure to produce all of the funds in his control on such settlement, and their misappropriation prior to the taking effect of their bond.

PUBLIC OFFICERS—SURETIES—DUTY OF OBLIGEE.—The obligee in an official bond is not bound voluntarily to warn the surety of the known dishonesty of his principal.

PUBLIC OFFICERS—SETTLEMENT—SURETIES FOR SECOND TERM.—Certificates of deposit issued by a solvent bank to a re-elected public officer, and treated as cash at his settlement for his first term, must be treated as cash in a suit on his bond for his second term approved after such settlement.

PUBLIC OFFICERS—SETTLEMENT—CONVERSION—SURETIES FOR SECOND TERM.—The fact that money represented by certificates of deposit produced by a re-elected public officer, and treated as cash in his settlement for his first term, is temporarily borrowed on his private note, does not affect the title to the fund, and if he afterward uses the money to pay such note this amounts to a conversion, for which the sureties on his bond for his second term, approved after such settlement, are liable.

PUBLIC OFFICERS—SETTLEMENT—SURETIES FOR SECOND TERM.—If certificates of deposit issued by an insolvent bank to a re-elected county officer are treated as cash in his settlement for his first term, and before the approval of his bond for his second term, the sureties on his bond for such second term are not liable for the loss occasioned thereby.

PUBLIC OFFICERS—SETTLEMENT—EVIDENCE—SURETIES FOR SECOND TERM.—Statements made by a re-elected public officer during his settlement of accounts for his first term are admissible in evidence in an action on his official bond for his second term.

PUBLIC OFFICERS—SURETIES FOR SECOND TERM.—Sureties on the bond of a re-elected public officer cannot avoid liability on account of false statements as to such officers' accounts made before their bond was executed, without authority, and having no connection with such officers' official duties.

PUBLIC OFFICERS—SURETIES FOR SECOND TERM.—Good faith or diligence in the obligee in an official bond in treating evidence of debt as money in making a settlement with a re-elected officer for his first term cannot be considered in deciding the question as to when he embezzled public money, in an action against the sureties on his bond for his second term.

W. Milchrist and T. G. Henderson, for the appellant.

Marks & Mould and Bevington & Kennedy, for the appellee.

⁶⁰ LADD, J. Harry Hubbard was chosen treasurer of the independent school district of Sioux City by its board of directors in September, 1893, and each year thereafter until March 21, 1898, when, under the provisions of the code, section 2754, his successor was elected by the voters of the district. At that time he should have had in money belonging to the different funds \$50,174.31. When this amount was demanded by his successor in office, he failed to turn it over, and this action was instituted for the recovery thereof from him and the surety on his bond, the American Surety Company of New York. The latter only defended. The bond covered a period of one year from September 20, 1897, though Hubbard's term of office expired in March, 1898. The issues raised by the answer involved the settlement of Hubbard with the board in September, 1897, and the validity of this bond. These will sufficiently appear when considered. The introduction in evidence of his annual report to the board of directors of September, 1897, and

his final report made in March, 1898, together with his book of account as treasurer, made out a prima facie case. The statute, as it formerly stood, required him to keep "a correct account of all expenses and receipts in a book provided for that purpose," and "to make to the board on the third Monday in September a full and complete annual report," and a statement of the finances of the district whenever requested by the board: Code 1873, secs. 1747, 1751; and the provisions of the code are, in substance, the same: ⁶¹ Code, secs. 2768, 2769. These reports were prepared, and his book of account kept by him in his official capacity as treasurer; and, as all officers are presumed, in the absence of any showing to the contrary, to have properly discharged their duties, the book of account was rightly received as an accurate record of the receipts and expenditures of the district, and the reports as true statements of its finances, without other proof of being correct. There is some conflict in the authorities as to the conclusiveness of such accounts and reports, but none as to their admissibility as evidence of indebtedness against the official and his sureties. The authorities are collated in a note to *Coleman v. Pike Co.*, 83 Ala. 326, 3 Am. St. Rep. 746, 3 South. 755; *United States v. Boyd*, 5 How. 29, and *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 197.

2. According to the statement made, the treasurer should have had in September, 1897, the sum of \$48,339.08, and he is presumed to have had on hand at that time all the funds with which he was chargeable: *District Tp. of Fox v. McCord*, 54 Iowa, 347, 6 N. W. 536. The statute provided that, when a "re-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor": Code 1873, sec. 690. See Code, sec. 1193. If the settlement of Hubbard was made, and all the funds and property of the district were actually produced, as required by law, such settlement, in the absence of fraud or mistake, is conclusive, and no inquiry will be tolerated concerning the source from whence any of the necessary money was derived: *Boone County v. Jones*, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987; 7 N. W. 155; *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Gage v. Chicago*, 2 Ill. 332. This duty of settling and requiring the production of funds before approving the bond, however, is due to the public and not ⁶² to the surety. Even in the absence of settlement he is liable for any defalcation during

the life of the bond. The board of directors, as such, were under no obligation to look after the interests of the American Surety Company, or to protect it from liability: *Palmer v. Woods*, 75 Iowa, 402, 39 N. W. 668; *Held v. Bagwell*, 58 Iowa, 144, 12 N. W. 226; *Board of Supervisors v. Otis*, 62 N. Y. 88. But the surety cannot be held liable for funds not produced at such settlement, and which were appropriated by the treasurer during some previous term: *District Tp. of Milford v. Morris*, 91 Iowa, 198, 51 Am. St. Rep. 338, 59 N. W. 274; *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534. As proof of a settlement establishes a prima facie case, the burden is cast on the surety to show the failure to produce funds, and their misappropriation, prior to the taking effect of his bond.

3. The statutes contemplate the actual production of money belonging to the public in making these settlements. Taxes are paid in money, which is turned over to the school treasurer. He has no authority, under the law, to invest or deposit it, or to pay it out, save under the direction of the board on orders duly signed for the expenses of the district. Having no legal right to change its form, how can he be permitted to produce any balance in his hands, except in the kind he has received? In *Boone County v. Jones*, 54 Iowa, 706, 37 Am. Rep. 229, 7 N. W. 155, the court said: "It must be presumed that the members of the board did their duty by counting the money which his (the treasurer's) report showed should be on hand." In *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534, the board of supervisors had counted, as funds, many thousands of dollars in certificates of deposit, checks, and other promises to pay, which had been loaned to the treasurer for such purpose, and were without validity, and it was held that "the members of the board were derelict in their duty in not requiring the treasurer to produce the funds—the money—or at least in not making inquiry of the proper parties as to what value the paper in question possessed." In *District Tp. of Milford v. Morris*, 91 Iowa, ⁶³ 198, 51 Am. St. Rep. 338, 59 N. W. 274, the court declared in unmistakable terms that a settlement at which a draft was produced in lieu of cash was "not such as the law contemplates. . . . We do not say that there might not be cases where the board would be justified in treating a draft on a solvent bank as cash in effecting a settlement with its officer; as, when they knew he had in the bank, subject to his credit, the amount represented by the draft. . . . There

is entirely too much carelessness on the part of the boards in settling with such officers, and the only safe rule is in all cases to compel the officer to actually produce the money. . . . Not having settled, as the law contemplates, by a production of the money, we hold that the sureties were not estopped from showing that the defalcation for which they are sought to be charged in fact occurred prior to the making and approval of their bond."

4. It must not be overlooked, however, that these settlements and the production of funds are intended for the security and protection of the municipalities by insuring punctuality and responsibility of public officials, and form no part of the contract with the surety: *Crawn v. Commonwealth*, 84 Va. 282, 10 Am. St. Rep. 839, 4 S. E. 721; *United States v. Kirkpatrick*, 9 Wheat. 720. See *State v. Carlton*, 1 Gill, 249. The surety may insist on the strict construction of his contract, and that no misrepresentation be practiced in its procurement. But it is no part of the obligee's duty to furnish him information. This he must ascertain for himself. Even if the board knew the treasurer had been using the money of the district during a prior term, they were not bound voluntarily to warn the surety of his dishonesty. They might remain passive, and, if the bond was sufficient, approve it: *Pine County v. Willard*, 39 Minn. 125, 12 Am. St. Rep. 622, 39 N. W. 71; *Harrisburgh v. Guiles*, 192 Pa. St. 191, 44 Atl. 48. See *Pickering v. Day*, 3 Houst. 474, 94 Am. Dec. 291. It is well said by Mr. ⁶⁴ Throop in his work on Public Officers, section 202, that: "As a general rule, the sovereign power is not charged with duties or obligations to individuals, and the exercise of its authority is not controlled by any rights which they may assert, except in the cases where the constitution has expressly fixed limits to such exercise. And where the bond runs to a municipal corporation, or a public officer, the obligee is a mere representative of a sovereign power, whose rights, powers, duties, and liabilities are fixed by statute, which not only charges the sureties with notice of the extent thereof, but binds them as well as the obligee. Thus, the obligee takes no power by intendment, or by his own acts or omissions of any other person. Consequently, questions arising between the sureties and the obligee in an official bond are properly to be regarded as part of those which relate to the liabilities, rather than the rights, of sureties." The supreme court of the United States, in *Hart v. United States*, 95 U. S. 316, used this language: "The government is not responsible for the laches or

the wrongful acts of its officers. . . . Every surety upon an official bond to the government is presumed to enter into his contract with full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be the loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect." The authorities relied on by the appellant relate to the duty of individuals or private corporations to sureties, and are not in point. The surety, then, is not in a position to complain because of the failure of his principal to produce the money at the settlement. The presumption of the law is against defalcation, and to overcome this he must go further, and show not only that the money was not produced, but that his principal did not, at the time liability on the bond attached, have it in his possession or control; for, if ⁶⁵ the money was within the keeping of him for whom the surety vouched, there was no misappropriation. The statutes do not authorize the school treasurer to loan or deposit public funds: Independent Dist. of Boyer v. King, 80 Iowa, 500, 45 N. W. 908; District Tp. of Bluff Creek v. Hardinbrook, 40 Iowa, 130. Nor do they permit the board of directors, at their annual settlements with him, to treat certificates of deposit, drafts, checks, or other evidences of debt as cash; and, as the law contemplates the production of money, the good faith of officials making settlements with custodians of public funds in examining evidences of indebtedness of any kind ought not to be considered. Their good intention could have no effect upon the treasurer's account, or what he had done with the district's money. In accepting anything other than that required by law, they are derelict in the performance of their duty. If, however, they do take into account certificates of deposit and other evidences of debt, which actually represent money, and the cash could and would have been produced by the treasurer had the board so desired, it is not perceived wherein the surety has suffered harm. In such a case these actually represent money. Had the money been borrowed temporarily for use in settlement, it, for the time being, would have become the property of the district, and its return in satisfaction of private obligations, even incurred for the purpose of procuring it, would have operated as a new conversion, for which the surety on the new bond would be answerable. Whether it might be followed by the district to the hands

of one receiving it with knowledge, we need not now inquire. Whatever may become of money after being produced for the time being, it is a part of the public funds, and should be treated as such. If thereafter used to satisfy private obligations made in acquiring it, this is a conversion after settlement, and not before. If the money was in any way brought into the treasury, even though with the intention to afterward withdraw it, and it ⁶⁶ was in fact thereafter abstracted, this surety is responsible: See *Ingraham v. President, etc.*, 13 Mass. 208; *Pine County v. Willard*, 39 Minn. 125, 12 Am. St. Rep. 622, 39 N. W. 71.

5. Demand certificates of deposit, issued by solvent banks, are usually treated as cash in commercial transactions, and, if these, running to the official as such, are procured in some way, and actually represent money obtainable on demand, does not such money become the district's property? If so, then its return to apply on a private debt is a conversion. We are of opinion that, if the certificates actually represent cash within the control of the treasurer, which could and would have been produced had the board of directors so demanded, they should be treated as money in a suit on the official bond. To hold otherwise would ignore business usages, and give undeserved importance to an irregularity, which could not have affected the rights of anyone concerned.

6. In making settlement with the board of directors, the treasurer produced no money. At that time he was cashier of the Home Savings Bank, and in lieu of cash presented the statement of its vice-president to the effect that, as treasurer of plaintiff, he had on deposit with it the sum of \$18,000; also four time certificates of deposit, aggregating \$20,500, payable in three and six months, with interest at the rate of five per cent per annum, and a demand certificate of deposit issued by the Security National Bank of Sioux City for \$9,600. We may consider these items separately, and, first, of the open account with the Home Savings Bank it then had in its vaults \$10,-107.45, and \$429.79 on deposit with the Hanover National Bank of New York City, and the evidence shows without controversy that these amounts could and would have been produced had the board indicated its wish that this be done. Without question, the surety's liability to this extent was ⁶⁷ fixed. This bank had also on deposit with the Security National Bank \$8,183.52. There was evidence tending to show that Henry Hubbard and either W. D. Irvine or Leah Hubbard had each executed a note

to this bank for \$5,000, and that the Home Savings Bank had agreed not to reduce its deposits with such bank below the sum of \$10,000, and that the Security National Bank might charge such notes to the account of the Home Savings Bank at any time. It will be observed, however, that the deposit had been reduced below the limit fixed, and Irvine, as vice-president of the latter bank, testified, in substance, that the money could and would have been produced had the board so demanded. It cannot be said, then, that this money was absolutely beyond the reach of the treasurer. That was a question for the jury to determine. The certificate of deposit of \$9,600 issued to him as treasurer of the Security National Bank was accompanied by a letter from its president, saying the deposit of funds had been made, and the money would be produced, if desired. The evidence is undisputed that this would have been done, and that the certificate represented money. That the means were temporarily borrowed on the treasurer's private note and that of another for the purpose of settlement cannot affect the title to the fund. If he subsequently used it to satisfy these notes, it amounted to a new conversion during the life of this surety's bond.

7. The balance of the money for which the treasurer was accountable was represented by four time certificates of deposit running to "Harry Hubbard, Treasurer." Three of these were signed by W. D. Irvine, vice-president of the Home Savings Bank, and the other by Hubbard, as cashier. We set out the respective amounts and time of maturity: March 16, 1897, \$3,500, payable in six months; August 20, 1897, \$5,500, ^{as} payable in six months; September 7, 1897, \$5,000, payable in three months; September 16, 1897, \$6,500, payable in three months. These were never paid. The bank failed in March, 1898, and the record does not disclose whether its assets are sufficient to satisfy these certificates. The treasurer had no authority to loan this money for private gain, and the failure of the board to provide compensation for services rendered by him furnishes no excuse for so doing. His duty was to hold the money subject to orders of the proper officers, and he had no right to use it in any other way. Even though the directors had agreed that he might loan the money, this would have been binding on no one. The statute provided the manner of compensation, and it was no part of the board's duty to devise other schemes, though ostensibly in the interest of economy: See *Wilkesbarre v. Rockafellow*, 171 Pa. St. 177, 50 Am. St. Rep. 795, 33 Atl.

269. The money was beyond his reach. As between himself and the bank, the latter merely owed him a debt. As to him, it was a private loan of public money, and a conversion of it. But even if this were not so, neither these certificates nor the moneys they represent were converted by the treasurer after this bond took effect. He never received anything on them after the annual settlement of 1897, and they were in his possession at the expiration of his term. True, he did not turn them over to his successor at that time, but he was not requested to do so. Money, not promises, was then wanted. Even refusal on demand is not conclusive evidence of conversion in all cases. The interest of the district in these certificates was not impaired in the slightest degree during the term for which the defendant was surety, and the latter is not liable for the amount represented by them.

8. In view of another trial, we should dispose of some other questions presented. Before the bond was executed, ⁶⁹ in reply to an inquiry from the surety, the president of the board advised it that the treasurer had last settled in February, 1897, and at that time the funds were counted, and found correct. This was untrue. The appellant claims to have relied on this misstatement, and, because of its falsity, seeks to rescind the contract. The representation was no part of the duty of the president of the board, nor was it ever authorized or ratified by that body. As what he said had no connection with the duties of his office, it must be regarded as his individual act, and not binding on the district: *Forcum v. Independent Dist. of Montezuma*, 99 Iowa, 435, 68 N. W. 802; *Young v. Blackhawk County*, 66 Iowa, 460, 23 N. W. 923; *Hard v. Decorah*, 43 Iowa, 317; *Independent School Dist. v. Wirtner*, 85 Iowa, 387, 52 N. W. 243. See *Palmer v. St. Albans*, 60 Vt. 427, 6 Am. St. Rep. 125, and note, 13 Atl. 569.

9. That evidence of the conversations with Hubbard during the settlement was admissible appears from *Boone County v. Jones*, 54 Iowa, 699, 37 Am. St. Rep. 229, 2 N. W. 987, 7 N. W. 155. What the vice-president of the bank said was mere hearsay. It was doubtless received as bearing on the good faith of the directors in accepting evidences of debt in lieu of money. As already said, we do not think good faith or diligence on their part ought to be considered in determining at what time another has embezzled public money. Neither *Webster County v. Hutchinson*, 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534, nor *District Tp. of*

Milford v. Morris, 91 Iowa, 198, 51 Am. St. Rep. 338, 59 N. W. 274, so holds.

Reversed.

Granger, J., not sitting.

OFFICIAL BONDS.—DEFAULTS OF A PRIOR TERM are not chargeable against the sureties on an official bond for a subsequent term. So far as practicable, the sureties on the last bond should be treated as if their principal had not been the incumbent of the office during the preceding term: See the monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 844, on the liability of sureties on successive bonds. Where there is a recital in an official bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety will be held liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified: *O'Brien v. Murphy*, 175 Mass. 253, 78 Am. St. Rep. 487, 56 N. E. 283.

WINDSOR v. DES MOINES.

[110 Iowa, 175, 81 N. W. 476.]

CONSTITUTIONAL LAW—CURATIVE ACT AS DEFENSE. A curative statute passed after the commencement of an action disputing the legality of certain proceedings, cured by the passage of such act, is a defense to the action.

CONSTITUTIONAL LAW—CURATIVE STATUTES.—A curative statute, whose preamble refers to certain specified defects, while the body of the act declares that a certain contract for the construction of an electric light plant, and the operation and maintenance thereof, "is hereby legalized as fully as though all requirements of law leading up to and necessary thereto had been followed in every respect, and on full compliance with the law," operates to cure all defects in the preliminary proceedings incident to the making of the contract, but does not necessarily render the contract valid.

CONSTITUTIONAL LAW—LIMITATION ON MUNICIPAL INDEBTEDNESS.—Under a constitutional provision prohibiting a city from incurring an aggregate indebtedness exceeding five per cent on the value of the taxable property within the city, to be ascertained by the last state and county tax list, the indebtedness of the city is not limited to five per cent of its property subject to taxation for city purposes, if the state and county tax lists include all property in the corporate limits, whether taxable for city purposes or not.

CONSTITUTIONAL LAW—LIMITATION ON MUNICIPAL INDEBTEDNESS—DEBT, WHAT IS.—If it is optional with a city whether it shall pay anything further on a contract, such contract does not create a debt to be considered in ascertaining whether the city has exceeded its constitutional limit of indebtedness.

CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS. BURDEN OF PROOF is upon a city to show that certain contract liabilities are to be paid out of its current revenues, when it is claimed that such liabilities exceed the constitutional limit of such city's indebtedness.

CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS.—A constitutional provision limiting the indebtedness of a city in any manner to a certain amount prohibits such indebtedness in the form of a bond, note, or any other kind of obligation, whether in writing or by parol, express or implied.

CONSTITUTIONAL LAW—LIMIT ON MUNICIPAL INDEBTEDNESS.—If a city agrees to issue warrants and levy a tax to pay a contract entered into by it, and also pledges its future revenues therefor, it creates an indebtedness within the meaning of a constitutional provision prohibiting it from incurring an indebtedness beyond a certain amount. In such case the city cannot anticipate its future revenues to be created by general taxation.

CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS—NECESSITY AS DEFENSE.—The necessity of a city for an electric light plant is no defense for the construction thereof by the city, if such act increases its indebtedness beyond the limit fixed by a constitutional provision.

CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS.—The right of a city to levy a special assessment to maintain and operate an electric plant does not authorize it to anticipate its future general revenues in excess of the constitutional limit for the purpose of erecting such plant.

CONSTITUTIONAL LAW—LIMIT ON MUNICIPAL INDEBTEDNESS—FUTURE PAYMENTS UNDER CONTRACTS.—If the time of payment for a contract entered into by a city for the erection of a public improvement is postponed to a future date, and no special levy of taxation for the purpose of erecting such improvement is authorized, the sums to become due under such contract must be taken into account in estimating the amount of the existing municipal indebtedness, in ascertaining whether it exceeds the constitutional limit.

CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL TAXATION.—The fact that a city does not, by entering into a contract for the construction of an electric light plant, obligate itself to pay more therefor than it has theretofore paid for lighting alone, is no defense for exceeding its constitutional limit of taxation by entering into such contract.

I. M. Earle and J. E. Mershon, for the appellants.

Cummins, Hewitt & Wright and Connor & Weaver, for the appellee.

¹⁷⁷ DEEMER, J. Prior to the year A. D. 1897, there had been in operation in the city of Des Moines three private electric light ¹⁷⁸ plants. In the early part of that year the city authorities concluded, however, to construct a fourth one at public expense. Pursuant to this purpose, the board of public works of the city published proposals for the construction of such works. In response to these proposals, the McCaskey &

Holcomb Company submitted three separate bids or propositions for the erection of a plant. Shortly after the submission of these bids, the mayor of the city issued a proclamation for a special election, and fixed the seventeenth day of May, 1897, as the time for holding it. The following is a copy of the form of ballot used at that election:

"Shall the following proposition be adopted: First. Shall the city council of the city of Des Moines, Iowa, authorize the McCaskey & Holcomb Company to construct an electric light plant, and erect the necessary wire and apparatus to furnish light to the city and its streets?

☐ For electric light plant.

☐ Against electric light plant.

"Shall the following proposition be adopted: Second. Shall an electric light plant, with necessary wires and apparatus, be established by the city of Des Moines?

☐ For electric light plant.

☐ Against electric light plant."

At the election, 3,756 votes were cast in favor of the electric light plant on both propositions, and 1,300 were registered in the negative. Only 31 votes were cast for the first proposition alone, and none for the second. The trial court held in favor of the plaintiff's contention that these propositions were inconsistent and contrary, and that, if this be not true, the city council was authorized to do either the one or the other of the two things authorized; thus leaving it to that body to do as it pleased, and grant a franchise or not, as it saw fit. The trial court also held, in effect, that the bids made by the McCaskey ¹⁷⁹ Company did not correspond with the published proposals. For these reasons it entered a decree for plaintiff, adjudging the election, and the contracts entered into pursuant thereto, void, and annulled the tax ordered for the purpose of meeting the obligations created by the contracts. After the decree had been entered, the legislature passed a curative act, which will be hereinafter more particularly referred to. After that act was passed, defendants asked for a vacation and modification of the decree. This request was denied, but defendants were given leave to file a petition to set aside and modify the decree, if they were so advised. Defendants now rely on this curative act as a defense to plaintiff's claims that the proposal for bids and the bids of the McCaskey Company, and the proposition submitted

to the electors at the special election, did not conform with law; while plaintiff contends that the curative act cannot be considered on this appeal; that, if considered, it did not cover all the defects in the proceedings leading up to the contracts sought to be annulled; and that, in any event, the invalidity of the contract for the purchase of land and of the tax levied to pay for the operation of the plant was not affected.

The first question for solution relates to the validity and scope of the act, and its effect on pending litigation. "A curative act may cure or legalize any act which the general assembly could, as an original question, have authorized": *Huff v. Cook*, 44 Iowa, 641; *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431, and cases cited. And a large discretion is vested with the legislature in determining when such special laws should be passed: *Chicago etc. Ry. Co. v. Independent Dist. of Avoca*, 99 Iowa, 556, 68 N. W. 881. It is no objection to such legislation that it was passed after action is commenced disputing the validity of the act. As a rule, every case must be determined on the law as it stands at the time judgment is pronounced. Of course, the legislature cannot impair the obligation of contracts, nor by subsequent legislation disturb vested rights. But the bringing of suit ¹⁸⁰ vests no right in a particular decision: *Huff v. Cook*, 44 Iowa, 639. This is a suit in equity, and is triable *de novo* in this court. Until final decree is passed, there is no vested right to be disturbed, and the case must be determined on the law as it now stands. These are elementary propositions, supported by the following, among other, authorities: *Iowa etc. Land Co. v. Soper*, 39 Iowa, 112; *Huff v. Cook*, 44 Iowa, 639; *Iowa etc. Assn. v. Heidt*, 107 Iowa, 297, 70 Am. St. Rep. 197, 77 N. W. 1050; *Iowa etc. Assn. v. Curtis*, 107 Iowa, 504, 78 N. W. 208.

But it is argued that the curative act does not cover all the defects in the proceedings, and that the contract should be annulled because of certain defects not mentioned in the curative act. While the preamble refers to certain specified defects, yet the act itself says that the contract made with the McCaskey & Holcomb Company, for the construction of the electric light plant, and the operation and maintenance thereof, "is hereby legalized . . . as fully as though all the requirements of the law leading up to, and necessary thereto, had been followed in every respect and particular, and on full compliance with the law": See Acts Twenty-seventh General Assembly, c. 184. While the preamble may be considered in arriving at the legis-

lative intent, yet if, in reading the enacting part, there is no ambiguity or doubt as to its scope or meaning, there should be no recourse either to the title or to the preamble in order to discover a different meaning: Sutherland on Statutory Construction, sec. 212, and cases cited. As a general rule, the preamble may extend, but cannot restrain, the effect of the enacting clause: Sutherland on Statutory Construction, sec. 213. It is clear, we think, that all defects in the preliminary proceedings incident to the making of the contract were cured by the act hitherto quoted.

But it does not follow that the contract is valid. Attack is made on it because it created a debt in excess of the constitutional ¹⁸¹ limitation. That limitation is in these words: "No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness": Const., art. 11, sec. 3. The assessed valuation of the taxable property within the corporate limits of the city of Des Moines, as shown by the state and county tax lists of the year 1896, was \$16,475,260. The authorized debt was therefore \$823,763. Plaintiff contends that the indebtedness is limited to five per centum of the property subject to taxation for city purposes. We cannot agree with him in this contention. The state and county tax lists include all property in the corporate limits, whether taxable for city purposes or not: *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682. At the time the contract in question was entered into, the bonded debt of the city was \$769,000. It was indebted on outstanding warrants in the sum of \$85,273.07. It had in cash on hand, belonging to eight or ten different funds, \$68,112.70. Taking from this last amount special funds which could not be used for the payment of outstanding warrants, and we find but \$47,729.28 in available cash on hand. The officers testify, however, that no warrants were drawn, unless there was an appropriation to meet them, and that as soon as the appropriation was exhausted no more warrants were drawn. As this evidence is uncontradicted, we must accept ¹⁸² it as true, and, if true, it eliminates the outstanding warrants. The city had also entered into a contract to purchase a new cemetery, in which it had the right to acquire title to a tract of land for cemetery purposes on payment of the sum of \$35,000, \$4,000 of which

amount was paid, and the city had the option to quit paying at any time, and to take title to such of the property as it had in fact paid for. Whether or not it should pay anything further on this contract was entirely optional with the city, and we do not think it should be treated as creating a debt: *Burnham v. Milwaukee*, 98 Wis. 128, 73 N. W. 1018. But it also appears that there were judgments against the city which were unpaid on August 3, 1897, amounting to something over \$14,692. In addition to this, the city had also entered into a bridge contract providing for the grading of approaches to what is known as the "Fifth Street Bridge" at an expense of \$19,100, and had also entered into various grading contracts imposing liabilities on the city amounting to something over \$13,000. It is contended by appellants that these contract liabilities should not be considered, for the reason there is nothing to show that they were not to be paid from the current revenues of the city as the work progressed. We think it fairly appears that these contracts created debts on the part of the city, and there is no showing that the amounts earned thereunder could be paid out of the current revenues. The burden is on the city to establish the claim made by it, and this it has failed to do: *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628. Indeed, as we understand it, the evidence shows that current revenues were absorbed by the warrants theretofore issued and the current expenses of the city. The amount of indebtedness against the city at the time the contracts in question were entered into was about \$816,000, and to this should be ¹⁸³ added about \$9,000 in accrued interest on the bonded indebtedness, making a total of about \$825,000. This is a fair and liberal estimate, and in arriving at it we have given the city the benefit of every doubt respecting the character of the indebtedness. There is no doubt in our minds that the city was indebted to the full constitutional limit at the time it made the contracts in question.

The remaining inquiry is, Did those contracts create a debt such as is inhibited by the constitutional provision? This involves the consideration of a long and carefully worded instrument, drawn for the evident purpose of meeting the constitutional objection. By the terms of the contract with the McCaskey Company, that company agreed to furnish the materials for and to construct an electric light plant, according to certain plans and specifications, to be completed and ready for occupancy on or before January 1, 1898. The plant was then to be accepted and approved by the city, and a payment of \$60,000

made on account of the construction thereof. The contractor was to operate the plant for the first year, and furnish certain lights to the city, and at the end of the year, if the plant had been operated according to agreement, it was to receive a further payment of \$25,000 on account of the construction, and monthly during the year for lights furnished the sum of \$2,708.33. The contractor was also to operate the plant during the second year, and to receive at the end of that year \$24,000 on account of construction, and the same monthly payments as during the first year. An option in the contract makes provision by which it was possible for the contractor to operate the plant for thirteen additional years. The provision as to payment reads as follows: "The company is to receive in full payment for the construction of said plant as provided in the specifications, and for operating and keeping the same in ¹⁸⁴ repair for the period of two years hereinbefore provided, the following sums, to be paid, however, only in the manner and from the funds herein-after specified: Upon completion and acceptance of plant, \$60,000; one year after completion and acceptance of plant, \$25,000; two years after completion and acceptance of plant, \$24,000; annually for each of two years the sum of \$32,500, payable in equal monthly installments." It is immediately thereafter recited that "the payment of \$25,000 shall not be considered as earned, accrued, and payable unless and until the company also during said year shall operate said plant, and keep the same in repair, as hereinbefore provided." There is a similar provision respecting the payment of \$24,000 to be made at the end of the second year. The city further agrees "that, at the proper time, it will duly levy, as a part of its authorized current revenues provided for by sections 675 and 676, McClain's Code, for the year 1898, a tax upon the assessable property in said city sufficient to produce the said sum of \$60,000, and that it will at the proper time duly appropriate from its said revenue the said sum of \$60,000, and cause the same to be paid as collected to the company, upon the completion and acceptance of the said plant, or, if the said sum has not been collected, to cause to be duly executed and delivered to the said company its warrants in proper form, drawn on said fund so appropriated, for the said sum of \$60,000, or any balance thereof not paid in money; the object and purpose thereof being to levy, anticipate, pledge, and appropriate from the current revenues of the city for the year in which said plant is completed the said sum of \$60,000 as the first payment thereon." In general terms, a

similar provision is made for the two payments of \$25,000 and \$24,000. Then follows an obligation on the part of the city to make the special assessment ¹⁸⁵ which it is claimed may be made for maintaining and operating an electric light plant, under sections 473, 474, and 475 of the code as amended, to provide a fund for the payment of \$2,708.33 per month to be paid for light, after which the city undertakes the following general obligation: "And the said city hereby agrees and obligates itself to do any and all things proper and necessary to the due levy of such contemplated taxes, and to duly appropriate from such general and special funds the said sums to be paid as herein stated, and to draw such warrants in anticipation of the actual collection thereof as hereinbefore specified, and the city hereby agrees to make such levy and appropriation, set apart and pledge such specified revenues to said extent for said purposes, and to use all due effort to collect and pay the same to the company; but it is hereby agreed that no general indebtedness for the payment of the specified sums is hereby created against the said city, but only the obligation to levy, anticipate, and pledge its current revenues, general or special, as and for the purpose hereinbefore stated. It is hereby agreed, also, that the city may, at its election, at any time, pay all or part of such deferred payments out of money on hand legally available for that purpose, and shall be entitled to receive upon such payments a discount of six per cent from the time it is so made until the time when it becomes payable, as hereinbefore provided, and shall thereupon be discharged pro tanto from the obligation to levy, assess, and collect said amount as an appropriation of its current revenues as above specified." Then follows this provision, pledging or mortgaging the property as security for the fulfillment of the promises made by the city: "And it is further agreed that, in so far as it has power so to do, the city does hereby pledge and mortgage to the company the entire plant to be constructed as described in the specifications hereto attached, with all appurtenances, and including also the tract of land whereon the power station of said ¹⁸⁶ plant is to be erected, to wit, lots 1 to 8, inclusive, Sibley's addition to the city of Des Moines, Iowa, to secure the full performance by the city of its covenants in this contract; the object and purpose of this clause being to give the company, in so far as the city has power to do so, a lien upon the said plant and premises to secure the said company the performance as aforesaid, on the part of the city, of the covenants of this contract by it entered into. And the

said mortgage shall be foreclosable in the ordinary manner upon failure of the city to perform any of the covenants of the contract upon its part, after sixty days' notice in writing of the particular default has been given to the city by the said company, unless such default be rendered within said sixty days." This is followed by a stipulation as to operation and repairs, as follows: "The company shall at once, upon the completion and acceptance of said plant in the manner provided in the specifications, be placed in possession of the entire plant, and shall during the said term of years, at its own expense, furnish and put in place on said plant all repairs necessary for its proper maintenance and operation, except such as may be necessary by reason of unavoidable casualty, as hereinafter specified; . . . provided, however, that in case of unavoidable casualty by cyclone, tornado, fire, etc., totally or partially disabling the said plant, the city shall, at its own expense, place the same in its former condition at the earliest period at which the same can be done, by the use of due diligence, and shall carry fire insurance upon the said plant to the extent of no less than \$20,000, and tornado insurance to an extent of not less than \$50,000." The last clause of the contract reads as follows: "It is further agreed that, in case either party shall at any time be prevented or delayed by legal process from performing any of the covenants hereby undertaken on its part, and this contract is subsequently finally held valid, and such process vacated and dissolved, or suits assailing its validity finally ¹⁸⁷ defeated or dismissed, such party shall at once thereupon proceed to perform all the conditions and covenants by it undertaken herein as nearly as possible as to time, in substantial conformance with, and in all other respects in full compliance with, this contract." We have now set out all parts of the contract material to the determination of the questions before us, and proceed to a discussion of these questions.

In *Mosher v. School Dist.*, 44 Iowa, 122, we said: "It will be observed that article 11, section 3, of the constitution provides that the corporation shall not become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum of the value of its taxable property. This prohibits an indebtedness in the form of bond, note, or any other kind of obligation, whether it be in writing or by parol, express or implied." As said by Justice Miller in *Litchfield v. Ballou*, 114 U. S. 192, 5 Sup. Ct. Rep. 821, construing the constitutional provision before quoted: "But there is no more reason for

a recovery on the implied contract to repay the money than on the express contract found in the bonds." The language of the constitution is that no city, etc., shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property. It shall not become indebted—shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and it ¹⁸⁸ is as binding in a court of chancery as a court of law. In *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215, we find this significant language: "The constitutional provision in question, it will be observed, prohibits the creation of indebtedness beyond the prescribed limit. It is an inhibition upon such indebtedness, however its creation may be attempted. It will cover the case of implied contract, as well as express contract by bond or otherwise. It is aimed at the indebtedness, not its form. It cannot be true, then, that a debt could be created because a consideration is received."

That the contracts in question created obligations on the part of the city there can be no doubt. It agreed to issue warrants, to levy a tax for the payment of the same, and also pledged its future revenues to the payment of these warrants. Had it issued the warrants, and failed to levy the tax, there is no doubt that the holder could have enforced them against the city: *Clark v. Des Moines*, 19 Iowa, 199, 87 Am. Dec. 423. At the time the *McCaskey* contract was entered into, there was no statute authorizing a special levy for the purpose of constructing electric light plants, and the warrants, when issued, could only be paid out of the general funds.

But it is said that the city may anticipate its revenues, and that in so doing it is not violating the constitutional provision, and reliance is placed on some language found in *Dively v. Cedar Falls*, 27 Iowa, 227, wherein it is said: "If A should undertake to build a courthouse within three years, doing so much, and to be paid accordingly, each year, the obligation of the contract would arise when executed, but the indebtedness, under

the constitution (if there was none other), would be measured by that to be paid each year. If this is not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of the funds in the public treasury. This the constitution never intended." What is there said is purely ¹⁸⁹ dictum, as appears in numerous subsequent cases, to which we will call attention. In *Scott v. Davenport*, 34 Iowa, 208, the *Dively* case is referred to, and it is there said: "The case of *Dively v. Cedar Falls*, 27 Iowa, 227, referred to by counsel for appellant, does not sustain their view. The court there decided that where a municipal corporation issued warrants or orders for the payment of money, directed to an officer of the same corporation, in an amount larger than five per cent of the taxable property within the corporation, such issue of warrants was not a violation of the section of the constitution above set out, when the corporation had, at the same time, the means in its treasury to meet the warrants. In such case, the issue of the warrants amounted to no more than a direction by the corporation to its treasurer to pay out the money then in the treasury upon the warrants. The warrants were not obligations to pay money that the corporation expected to realize from property purchased. The cases are essentially different. In this case the issue of the bonds would create an indebtedness which the city would be bound to pay." We quote further from that case as follows: "It is only expected that at some future day the city will have the money to pay them [the bonds], derived from the revenues of the waterworks for which it is proposed to create this additional indebtedness. However reasonable this expectation may be, and however much the erection of the works may conduce to the safety of property and to the convenience or health of the people within the city, the constitution, the language of which seems too plain to be misunderstood, will not permit the creation of this additional debt for that or any other purpose." In *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628, the effect of the anticipation of current revenues was considered, and we there said: "If the bonds in question should be issued upon the faith of the uncollected taxes and the levy for the current year, there is no power which could ¹⁹⁰ prevent the city authorities from absorbing the taxes as collected in payment of ordinary current expenses. Indeed, such a course might be absolutely necessary to maintain the city government. It is plain that, if bonds should be issued in anticipation of uncollected taxes, the constitutional limitation

might, and probably would, be transcended." To these rules there are some exceptions. For instance, it is generally held that future revenues may be anticipated to meet contracts for current expenses. Such a rule, or rather exception, is absolutely necessary to the life of the city, and to the successful accomplishment of its purposes. In *Grant v. Davenport*, 36 Iowa, 396, this exception was applied, and it is there said: "Any appropriation of these revenues, therefore, whether by ordinance, or by contract, to the payment of the ordinary expenses, would be, beyond question, as it seems to us, both reasonable and proper. And if the appropriation was made in advance of the receipt of the revenues, the action would be just as legitimate, because that the revenues will be received is a legal certainty. . . . If, therefore, the ordinance in question accomplishes this, and no more, its validity is settled. But that a supply of pure water to the inhabitants of a city for their health and domestic use, as well as for the purpose of extinguishing fires, is the duty of a city, and that the cost thereof properly comes within the term 'ordinary expenses,' is not questioned by appellant's counsel, nor, indeed, could it be by anyone. The city of Davenport would surely become indebted further by employing individuals or a corporation to construct its waterworks for it, in consideration of a certain sum, to be paid in bonds or other evidences of indebtedness: *Scott v. Davenport*, 34 Iowa, 208. And the necessity for the waterworks would constitute no justification or excuse for the violation of the constitution or of the statute. But if it can induce individuals or a corporation to construct and maintain such works for the use ¹⁹¹ and benefit of the municipality and its inhabitants, and can pay a just and fair rent, as agreed, out of its current revenues, and can also, out of such revenues, pay its other ordinary expenses, we can see no sufficient reason for holding that an agreement to pay such rent, either weekly, monthly, quarterly, or annually, creates an indebtedness against the city. From these illustrations, as well as from the plain and practical meaning of the language of the constitutional inhibition, the true rule and just interpretation is evolved, to wit, that where the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness, within the meaning of the constitutional provisions." In *Water Co. v. Woodward*, 49 Iowa,

58, this language is found relating to the subject now under consideration: "The tax required to be levied is clearly authorized by the statute, and such tax, together with the income of the company derived from other sources, the ordinance expressly provides shall pay the obligations assumed by the city. If it does not, neither the bondholders nor the company have any claim on the city for the deficiency. The obligation of the city is to levy the tax, and see that the amount collected is applied to the specified purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city, and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby, and there cannot be such an indebtedness. In any constitutional sense, the prohibited indebtedness must be a burden, and payable by the city from funds which could not constitutionally be appropriated to that purpose. Whether the fund legally provided will be sufficient for the designated purpose we have no means of knowing. Nor is this regarded ¹⁹² as material, if no other charge is created on the city by the ordinance." In that case the city was also given the option to purchase the works, and of that it is said: "Now, the ordinance expressly provides that the city may purchase the works as soon as its financial condition will permit. But this provision cannot have the effect to create a present or future indebtedness, and, without serious doubt, was agreed upon in view of the present financial condition of the city. If, at some time in the future, the city can, without a violation of the constitution, purchase the works, and chooses to do so, we are unable to see that such a state of facts creates a present indebtedness, or that any obligation is now assumed by which a debt can be said to be created which is unconstitutional."

We think there is a radical distinction between a contract to procure light for a city and its inhabitants, and a contract for the construction of an electric light plant for a city, and the necessity for the plant constitutes no excuse or justification for the violation of the constitution. This distinction is pointed out in the Grant case, *supra*, and is made plain in *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279. See, also, *Earles v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 885, 68 N. W. 964. Grant that the city had a right to levy a special assessment for the purpose of maintaining and operating an electric light plant, as provided by section 2 of chapter 11 of the acts of the twenty-second general assembly, yet it does not follow that it could an-

ticipate its future general revenues, for the purpose of erecting such a plant.

Again, it is argued that the contract does not create a debt, but merely a contractual obligation, which may only become a debt as the light was furnished and the compensation earned. It seems to be conceded that, if the contract related to the ordinary expenses of the city, as the furnishing of light or water, or of fire protection, this argument would be sound. Indeed, it is expressly so held in ¹⁹³ many of the cases heretofore cited. But does this rule apply to a contract for the construction of a plant for the purpose? Expressions may be found in some of the cases cited that give color to this argument: See *Dively v. Cedar Falls*, 27 Iowa, 227; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579, 55 N. W. 348; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Water Co. v. Woodward*, 49 Iowa, 58; and in some cases this is no doubt the rule: See *East St. Louis v. East St. Louis Gaslight etc. Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94; *Smith v. Dedham*, 144 Mass. 177, 10 N. E. 782; *Merrill etc. Lighting Co. v. Merrill*, 80 Wis. 358, 49 N. W. 965; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77. But where the contract is for the erection of electric light plants, or for any other improvement, and the time of payment is postponed to a later date, and no special levy for the purpose of erecting such works is authorized, the rule seems to be well settled that the sums to become due in the future must all be taken into account in estimating the amount of the existing indebtedness of the municipality: *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *French v. Burlington*, 42 Iowa, 614.

This must be the true rule, for, if appellants' contention be correct, the city might, by contracts such as the one in suit, absorb all the general revenues in advance, and leave nothing for the payment of current expenses. Suppose a city should anticipate all its general revenues, and thus leave nothing for the payment of current expenses, and suppose, further, that it should issue warrants for the payment of these expenses, which were not paid for want of funds; could not the holder of these warrants enforce them against the city, and if enforced, and the city is compelled to pay (as no doubt it would be obliged to do) the ¹⁹⁴ amount thereof, in addition to the amounts previously appropriated for improvements, would not the very object of the constitutional provision be thwarted, and a wise provision of

our fundamental law rendered nugatory? The answer to these propositions is so obvious that no amount of refinement can add anything to the conclusion. We are cited to no case that establishes a contrary doctrine. Language is no doubt used in some of them which is broad enough to sustain appellants' contention, but that language must be interpreted in the light of the facts disclosed in the opinions. So interpreted, there is no real conflict in the cases on this proposition. As a general rule, a city may not anticipate its general revenues to be created by a scheme of general taxation. Special taxes and assessments may, however, be anticipated in a proper case: *Davis v. Des Moines*, 71 Iowa, 500, 32 N. W. 470; *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431; *Anderson v. Orient Fire Ins. Co.*, 88 Iowa, 579, 55 N. W. 348; *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532. As supporting the general rule announced, see, also, *Read v. Atlantic City*, 49 N. J. L. 558, 9 Atl. 759; *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222, 24 S. W. 872; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *State v. Commissioners*, 37 Ohio St. 526. That such is the legislative intent is clearly indicated by section 1 of chapter 4 of the acts of the twenty-second general assembly, which reads as follows: "All cities of the first class shall make their appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for the city council, or any officer, agent, or employé of the city, to issue any warrant, enter into any contract, or appropriate any money in excess of the amounts thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made, and any such city shall not appropriate, in the aggregate, an amount ¹⁹⁵ in excess of its annual legally authorized revenue, but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation was made, or from bonding or refunding their outstanding indebtedness, provided, that this section shall not apply to cities of the first class organized since 1881." In construing this section, we said, in *Phillips v. Reed*, 107 Iowa, 331, 76 N. W. 850, 77 N. W. 1031, that the object of the law was to place municipal corporations on a cash basis, and prevent the accumulation of such a floating indebtedness as appears in that case.

We do not overlook the fact that the city has the right to establish electric light plants, and to acquire a site therefor, and

to pay for the same out of the general revenues. That fact is not regarded as controlling, however, for there is no authority to levy a special tax for either purpose.

Further, it is said on behalf of the city that it did not obligate itself to pay more under the contract for the plant and the expense of operating the same than it had theretofore been paying for lighting alone. We do not think this fact, even if true (and we doubt if it be established), is of controlling importance. It may have paid more for lighting than it should. But, however this may be, such situation does not authorize it to enter into a contract for the construction of a plant in violation of the constitutional inhibition.

We need not consider the obligation of the city to rebuild the plant in case of destruction by fire or otherwise. That such provision could not be enforced if, when time for performance arrived, the city was indebted to the constitutional limit, is too clear for argument.

As the contract for the purchase of the site is conditional on the main contract being held valid, there is no necessity for considering the legality of the contract made with the trustees of the Sibley estate.

Careful consideration of the authorities cited, aided by patient independent examination of the questions ¹⁹⁶ involved, leads to the conclusion that the contracts in suit, as well as the tax levied pursuant thereto, are invalid, and that the decree of the district court is right.

Affirmed.

Granger, C. J., not sitting.

ON CURATIVE STATUTES, see Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883, and note.

MUNICIPAL INDEBTEDNESS, LIMITATION ON.—Within the constitutional limitation upon municipal indebtedness, no distinction exists between debts imposed by law and those voluntarily assumed, and it makes no difference whether the debts are incurred for necessary current expenses or not: Grand Island etc. R. R. Co. v. Baker, 6 Wyo. 369, 71 Am. St. Rep. 926, 45 Pac. 494. The form of the debt is immaterial: See the monographic note to Beard v. Hopkinsville, 44 Am. St. Rep. 233. The moment an indebtedness is voluntarily created in any manner or for any purpose, with no means in the treasury, nor revenues collected or in process of collection, for payment of the same, that moment such debt must be considered in determining whether the municipality has exceeded the constitutional limit of its indebtedness: Earles v. Wells, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964. A debt cannot be incurred beyond the limit fixed by the constitution, even for current expenses, no matter how urgent: Laporte v. Gamewell etc. Co., 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588.

PEORIA STEAM MARBLE WORKS v. HICKEY.

[110 Iowa, 276, 81 N. W. 473.]

RECEIVERS—AUTHORITY TO MAKE NOTES.—A receiver authorized to buy material has no implied power to execute notes in payment therefor, and he is individually liable thereon, though both parties intended to bind the maker as receiver and not individually.

RECEIVERS—LIABILITY ON NOTES.—A receiver has no principal behind him for whom he can promise and he alone is individually liable on notes executed by him as receiver without express authority, nor can such notes be reformed so as to speak the true intent of the parties.

RECEIVERS—NOTES EXECUTED BY—REFORMATION.—If one court appoints a receiver without authorizing him to execute notes, another court has no jurisdiction to reform such notes so as to make them speak the intent of the parties and bind him as receiver only.

RECEIVERS—NOTES EXECUTED BY—RATIFICATION.—An order of court confirming a receiver's report showing liability existing against the funds in his hands, but not referring to notes executed therefor, is not a ratification of the act of the receiver in executing such notes without express authority.

J. W. Roberts, for the appellant.

J. Harrington and J. C. Davis, for the appellee.

277 **DEEMER, J.** The superior court of the city of Keokuk appointed defendant as receiver of a stock of granite and marble owned by one John T. Crotty, and in the order appointing him directed that he dispose of the same in the usual course of trade, subject to the orders of the court. The order further continues: "Said receiver is further empowered to take from the defendant, John T. Crotty, the orders for tombstones and monuments now in his hands, and to fill same, if in his discretion he shall see fit to do so. Said receiver is authorized to make such purchases of material and stock during the conduct of said business as he shall deem best. Said receiver shall at once make an inventory of the stock on hand, and the contracts which shall come into his hands from the defendant, John T. Crotty." Defendant relies on this as his authority for executing the notes in suit. The order was entered on February 23, 1893, and the notes were not executed until the fall of the year 1896 and the early spring of 1897. At the time these notes were executed, the necessity for the receivership had practically ceased, but defendant still continued to act in that ²⁷⁸ capacity, and made the notes for goods sold and delivered by the plaintiff.

Had defendant authority to make the notes as receiver? As receiver, he had no such authority. General authority to an agent to transact business does not invest him with power to make his principal a party to negotiable paper: *Whiting v. Western Stage Co.*, 20 Iowa, 554. This is a general rule applicable to all agents: See *Mechem on Agency*, sec. 391; *Paige v. Stone*, 10 Met. 160, 43 Am. Dec. 420; *Rossiter v. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62; *Temple v. Pomroy*, 4 Gray, 128. The only exception arises where, by necessary implication, the duties to be performed cannot be discharged without the exercise of such power. The order does not give the receiver express power to execute promissory notes, and we do not think he had implied power, for the reason that the duties imposed upon him could as well be exercised without such authority as with it.

But it is said that both parties intended to bind the defendant as receiver, and not individually, and that the contract should be reformed to express the true agreement. Granting, for the purpose of the case, that that was the intent of the parties, yet it also appears that plaintiff intended to hold some one by the notes, and that it fully understood defendant had authority to act as receiver. As a general rule, equity will reform contracts entered into through mistake, so as to make them express the true agreement, and such reformation will be granted, although the mistake was purely of law: *Lee v. Percival*, 85 Iowa, 639, 52 N. W. 543; *Smith v. Watson*, 88 Iowa, 79, 55 N. W. 68; *Capital etc. Trust Co. v. Swan*, 100 Iowa, 722, 69 N. W. 1065; *Williams v. Hamilton*, 104 Iowa, 428, 65 Am. St. Rep. 475, 73 N. W. 1029. These authorities and others that might be cited, also hold that a note signed by one as agent will be reformed so as to make it the obligation of the principal. To this rule there are some exceptions growing out of the capacity in which the agent assumes to act. For instance, an executor or administrator cannot, in the absence of authority given by the will of ²⁷⁹ decedent, or by statute, make an executory contract binding on the estate he represents. If he assumes to make such contract on a new and independent consideration, it is his personal obligation, and he will be bound thereby, although the debt was incurred for the benefit of the estate: *Dunne v. Deery*, 40 Iowa, 251; *Livermore v. Rand*, 26 N. H. 85; *Woerner on Administrators*, sec. 356; *Winter v. Hite*, 3 Iowa, 142; *Thilmany v. Iowa Paper-Bag Co.*, 108 Iowa, 357, 75 Am. St. Rep. 259, 79 N. W. 261. This same rule applies to contracts made by guardians: 9 Am. & Eng. Ency. of Law, 112; *Sperry v. Fanning*,

80 Ill. 371; *Rollins v. Marsh*, 128 Mass. 116; and by trustees: *Perry on Trusts*, 4th ed., sec. 437a; *Duvall v. Craig*, 2 Wheat. 45; *Gill v. Carmine*, 55 Md. 339. Another general rule is that when an agent contracts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound. To this rule there are also some exceptions, which are referred to at length in the *Thilmany* case, *supra*. This case does not come within any of the exceptions there stated. Referring to the *Winter-Hite* case, it is there said that contracts with executors, etc., should not be confounded with those entered into by agents. The plain reason for this distinction is that there is no principal to be bound. A trustee, guardian, or executor is not the agent or hand of the court concerning those contracts that he has no authority to make, but acts on his own responsibility, and is individually liable to perform them. In such cases there is no contract to reform. If it is not the contract of the individual, it is no contract, and, instead of being reformation, there is cancellation.

Do the rules applicable to executors, administrators, and guardians obtain in interpreting contracts made by receivers? We think they do. "*De similibus idem est iudicium.*" As the receiver had no authority to execute the notes in suit, he had no principal against whom plaintiff might maintain an action, and, unless he is bound, no one ²⁸⁰ is responsible. If the debt was properly incurred, he will be allowed the amount paid out on his accounting. Plaintiff's right of action, if it has any, is on the defendant's promise. Like the executor, the assignee, the guardian, and the administrator, he has no responsible principal behind him for whom he may promise, and he alone is liable on the contract: *Vilas v. Page*, 106 N. Y. 451, 13 N. E. 743; *Meyer v. Lexow*, 37 N. Y. Supp. 67; *Rogers v. Wendell*, 7 N. Y. Supp. 781, and authorities cited. The district court had no authority over defendant as receiver, and could not charge the fund which he held. He was appointed by the superior court; that alone had jurisdiction of the fund in his hand. As that court had not authorized him to make the contract, there was no contract with the receiver as such, and the effect of the decree entered by the trial court was to cancel the notes in suit. That was not what the defendant asked, and such relief is unwarranted, both in law and in equity.

Cases holding an agent liable who contracts without authority are numerous, and, almost without exception, the rule is that, if an executor, assignee, trustee, administrator, guardian, or receiver enters into an executory contract on a new and independ-

ent consideration, he is personally bound thereby, although he may have intended to bind the estate or fund in his hands. The law denies the authority of such person, and in this respect the case differs from one of pure agency. That distinction was made plain in the early case of *Winter v. Hite*, 3 Iowa, 142. As he had no authority to bind any person but himself, the notes are his, and he cannot have them reformed. That the parties may have intended to bind the funds in the hands of the receiver is not controlling. Under the facts disclosed, his contract is personal, and no reformation can be had; for, if there was no responsible principal, there can be no reformed contract.

But it is said that the superior court ratified the giving of the notes, and that this ratification amounted to previous ²⁸¹ authority. This argument is evidently based on a misapprehension. True, the receiver made a report showing the liabilities existing against the funds in his hands, but no reference is made to the notes in suit, and no statement is to be found therein showing that he executed the notes in suit after his appointment as receiver. Without full knowledge of the facts, there can be no ratification. This rule is elemental, and needs no citation of authorities to support it. It is important that we distinguish cases such as this from cases where there is a responsible principal that has authority to act under certain circumstances.

Appellee relies on adjudications from other states that with one exception are found to relate to a state of facts where there was a responsible principal, but both parties were mistaken as to his actual authority. The exceptional case we do not think is sound, and we decline to follow it.

That the parties intended to make binding contracts there can be no doubt. To hold the defendant individually responsible is to follow the law as it is written, and the result is one they are conclusively presumed to have apprehended. Defendant may charge the funds for the amount recovered against him if the contracts were of benefit to the estate or funds in his hands. If he has distributed the funds without taking into account the notes in suit, it is a mistake from which the law will not relieve him. On the whole, the result that follows seems to be equitable, in view of the facts disclosed by the record, and we have no doubt that the proper application of legal principles accords with the equities of the case. Plaintiff should have judgment for the amount of the notes in suit.

Reversed.

Granger, C. J., not sitting.

MR. JUSTICE GIVEN DISSENTED on the ground that as the receiver had authority to carry on the business and purchase material and stock, he had a right to incur indebtedness for what he purchased and give his notes as receiver to evidence such indebtedness, binding upon the funds in his hands as receiver. A receiver is an officer of the court, not acting for a principal in the sense that agents do, and the rules applicable to agents are not controlling in determining the scope of his authority, and such rules should not be allowed to prevent a court of equity from enforcing, as between the parties, what they intended should be the relations and obligations between them.

RECEIVER.—Although a receiver may have no right to borrow money, if he uses money borrowed by him to discharge a lien on the property, he is entitled to credit therefor: *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271, 36 N. E. 562.

BORN v. HOME INSURANCE COMPANY.

[110 Iowa, 379, 81 N. W. 676.]

INSURANCE—NOTICE OF FORFEITURE.—Notice to the insured by the insurer, who has issued two policies to the former, stating the aggregate amount required to pay customary short rates and expenses, in order to cancel both policies, and the amount of premium due under a note given for unpaid premiums on both policies, but not stating the amount required on each policy separately, is insufficient to forfeit or suspend one of the policies alone for nonpayment under such notice.

INSURANCE — MORTGAGE CLAUSE — FORFEITURE.—A policy insuring both real and personal property, and providing that if "the property" shall thereafter become mortgaged the policy shall be void, must be regarded as treating "the property" insured as a whole, since it does not provide a forfeiture for mortgaging "any of the property," and consequently mortgaging the personal property does not forfeit or avoid the policy.

INSURANCE—REVIVAL OF POLICY AFTER FORFEITURE.—If a policy of insurance provides that it shall become forfeited if the property is thereafter mortgaged without the consent of the company, the fact that the property is so mortgaged does not avoid the policy, provided the mortgage is paid off and satisfied prior to the loss, as such payment operates to restore the property to the protection of the policy.

W. G. W. Geiger and Smith, Kirk & Smith, for the appellants.

T. A. Cheshire, McVey & McVey, and E. M. Brink, for the appellee.

380 GIVEN, J. The defendant issued to the plaintiff its two policies of insurance on certain real and personal property,

each running from May 22, 1893, to May 22, 1896; the one in suit, being No. G. F. 94,403, insuring against loss by fire or lightning, and the other, A 36,125, against loss by tornado, cyclone, or wind storm. In consideration of this insurance the plaintiff paid to defendant eight dollars in cash on account of premium on the fire policy, and executed and delivered his one promissory note for sixty-six dollars, payable on or before the first day of May, 1894, "in payment of the premium of policy No. G. F. 94,403, A 36,125." On the twenty-fourth day of March, 1894, the defendant mailed, by registered letter, notice, under chapter 210 of the laws of the eighteenth general assembly, to the plaintiff, which he received on the second day of April, 1894. On the eleventh day of March, 1895, the plaintiff's barn and part of the personal property covered by the fire policy was destroyed by fire. Plaintiff made no response to the notice by registered letter, and has ³⁸¹ never paid any part of said promissory note, and defendant's contention is that by reason thereof the policy sued upon became and was suspended long before the loss occurred. Plaintiff insists that said notice was not as required by said chapter 210, in that it did not designate the amount to be paid on account of the policy in suit, or state the customary short rates thereon. The notice informed the plaintiff that "your note for insurance under Policy No. G. F. 94,403, A 36,125, falls due on the first day of May, 1894"; that the amount of the note was sixty-six dollars, amount of interest, four dollars and eighty-four cents—total, seventy dollars and eighty-four cents; also, that "the amount required to cancel your contract, in case you so elect, is forty dollars and ten cents, being our customary short rates and expenses"; and that, "unless payment is made within thirty days, your policy will be suspended." These amounts include the entire note and the short rates thereon, and plaintiff insists that, to be valid, it should have included that part of the note given for premium on the policy in suit, and the short rates on that amount. Defendant contends that the note was a single transaction, and that it was its privilege "to suspend this note; not half of it, but all of it." This contention is answered in *Smith v. Continental Ins. Co.*, 108 Iowa, 382, 79 N. W. 126. The only distinction between that case and this is that in it two notes were executed for the aggregate premium to be paid, while in this there was but one. Following that case, we hold that the notice was insufficient to entitle the defendant to cancel the policy in suit.

2. The policy sued upon insures the plaintiff to the amount of four thousand dollars, as follows: Four hundred dollars on dwelling-house; two hundred dollars on contents; six hundred dollars on barn and sheds attached, marked "No. 1" on diagram, barn and shed marked "No. 2" on diagram, harness, etc.; two hundred dollars on farm implements, granary, and crib; four hundred dollars on grain; ³⁸² two hundred dollars on hay; seven hundred and fifty dollars on horses, mules, and colts; nine hundred dollars on cattle; fifty dollars on sheep; and three hundred dollars on hogs. The barns and a considerable portion of this personal property were destroyed by fire. The plaintiff gave several chattel mortgages on parts of this personal property, without the knowledge or consent of the defendant, wherefore the defendant claimed that there was a forfeiture of the entire policy. The plaintiff insists that the forfeiture clause only relates to the real estate; that if it relates to both, he had the right to sell the personal property; that mortgaging was one form of selling; and that, if these positions are not tenable, still he is entitled to recover the value of the barn and other property that was not mortgaged or encumbered. We must look to the terms of this policy to see whether, notwithstanding the premium is a gross sum, it does not limit forfeiture on account of mortgaging to the mortgaging of all of the property. The policy contains the following: "This indemnity contract is based upon the valuations and representations contained in the assured's application and diagram of even number herewith, which the assured has signed, and permitted to be submitted to the company, and which are hereby made a warranty, and a part thereof; and it is stipulated and agreed that if any false statements are made in said application or otherwise; or if the assured, without written consent thereon, has now or shall hereafter procure, any other contract of insurance, whether valid or not, on any of said property; or if the property shall hereafter become mortgaged or encumbered; or upon the commencement of foreclosure proceedings; or in any case any change shall take place in title or possession (except by succession by reason of the death of the assured) of the property herein named; or if the assured shall not be the sole and unconditional owner in fee of said property; or if this policy shall be assigned without written consent thereon; or if the premises described shall be occupied for other than ³⁸³ farm purposes; or if they are now vacant, unoccupied, or uninhabited, or shall become vacant, unoccupied, or uninhabited, without written consent hereon—then, in each and every one

of the above cases, this policy shall be null and void." The plaintiff relies upon the words "diagram," "owner in fee," "premises described," "vacant, unoccupied, and uninhabited," as showing that the forfeiture clause only relates to the real estate. Surely, these words are not applicable to the personal property, but it does not follow that the clause against mortgaging does not apply to both. It is general, and alike applicable to the personal and real property, and its application should not be restricted simply because of the use of words only applicable to one. It is a familiar rule that forfeitures are not favored, that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to clearly show that he is entitled to it. The language of the policy is, "or if the property shall hereafter become mortgaged or encumbered" the policy becomes null and void. It is the property, not a part of it, not the real nor the personal, but the whole, property, the mortgaging of which renders the policy void. That the words "the property" were intended to include all the property is indicated in what immediately precedes as to other insurance "on any of said property." The use of "the" in the one instance and "any" in the other surely indicates an intention to express something different and the same is true as to the use of the word "any" in respect to change in title or possession. "The property" is without qualification, and we think must be held to refer to all the property insured, and therefore mortgaging or encumbering a part of it did not work a forfeiture of the entire policy: *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 509, 27 Am. Rep. 582; *Bailey v. Homestead Fire Ins. Co.*, 16 Hun, 503; *May on Insurance*, sec. 278; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 55, 4 Am. Rep. 582. Counsel have discussed at length, and with numerous citations, whether this contract of insurance is divisible; but, as we ³⁸⁴ view the record, this question is not involved. Our conclusion is that the contract was not forfeited by a failure to pay the premium because of the insufficiency of the notice, or by giving the mortgages on part of the chattels, because of the language of the policy.

3. It appears that all of the chattel mortgages given by the plaintiff on the insured property were paid off before the fire, except a part of the one to Porter on eight cows and two horses. We are unable to determine from the record whether any of this property was destroyed, and it is not important that we should, as plaintiff's counsel do not claim the right to recover therefor.

They say in argument: "Remember, we do not claim to recover for any of the property that was covered by the chattel mortgage, although it was destroyed; our contention being that, the moment the mortgage was placed upon it, and whilst it remained upon it, it was the same as property sold, and out of plaintiff's possession." A part, at least, of the chattels covered by the mortgage that had been paid off was destroyed, and for this the plaintiff asks to recover. We have seen that giving those mortgages did not render the policy void; hence the plaintiff had a valid policy covering all the property insured therein. It is conceded that giving the mortgages withdrew the mortgaged property from the protection of the policy during the life of the mortgages, and the contention is whether, by a satisfaction of the mortgages that were paid off, the property therein described was restored to the protection of the policy. The theory upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk: *Ellis v. State Ins. Co.*, 61 Iowa, 577, 16 N. W. 744; *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683. In this case increase of risk is not pleaded as a defense, nor does it appear that the policy contained a provision against such an increase. If such a provision should be implied, its violation would only suspend the policy as to the property upon which the risk ³⁸⁵ was increased during the time thereof. If the plaintiff had violated the terms of the policy by changing the location of his kitchen stove in the building insured, or by leaving the premises unoccupied, and had afterward, and before loss, replaced the stove or reoccupied the premises, such violation would only be held to have suspended the policy during the period for which it was violated; and, if the property was in the condition and occupancy required by the policy, at the time of the loss, such suspension would be no defense: See 1 *May on Insurance*, 3d ed., sec. 101, and cases cited; 2 *Am. & Eng. Ency. of Law*, 288, and note. At the time of the loss the personal property in question was in the possession and ownership of the plaintiff, free from the encumbrances of the mortgages and covered by his valid policy of insurance. Therefore, he is entitled to recover for the loss thereof. See, as directly in point, *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455. It follows from these conclusions that the court erred in sustaining defendant's motion for a verdict.

Reversed.

Granger, C. J., not sitting.

Revival of Forfeited Insurance by Discontinuance of Cause of Forfeiture Before Loss.*

The general rule to be deduced from the weight of authority is, that the violation of a condition in a policy of insurance which works a forfeiture thereof merely suspends the insurance during the violation, and that if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture therefor. The decisions upon this subject, however, are by no means uniform, and while the majority of them maintain the doctrine above stated, a considerable number assert that upon a breach of condition for which a forfeiture of the insurance might be declared, the policy, from that fact itself, becomes void, and can never be restored to validity except with the consent of the insurer, and that the fact that the breach of condition is past and did not contribute to the loss does not necessarily put an end to the right of the insurer to avoid the policy. Both classes of cases will be noticed in the following note.

Mortgages.—In accordance with the ruling in the principal case, it has uniformly been held in Nebraska that where an insured encumbers his personal property by a chattel mortgage after such property has been insured, and contrary to the conditions in the policy against encumbrances, and rendering the insurance void therefor, he may, nevertheless, recover the value of the insured property under the policy, if at the time of its destruction it was free from the lien of the mortgage. In such case the payment, cancellation, or discharge of the mortgage and lien before the loss occurs, revives and reanimates the contract of insurance without the consent of the insurer, although during the continuance of the mortgage lien the policy was suspended and might have been, by the insurer, declared forfeited: *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866; *Home Fire Ins. Co. v. Johansen*, 59 Neb. 349, 80 N. W. 1047. The same rule has been lately announced under exactly similar facts by the supreme court of New York in *Tompkins v. Hartford Fire Ins. Co.*, 22 N. Y. App. Div. 380; 49 N. Y. Supp. 184. These cases are opposed by that of *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297, 35 S. W. 429, wherein it is held that if a policy of fire insurance provides that it shall be void if the property insured is encumbered by mortgage, the giving of the mortgage on the property subsequently to the insurance

*REFERENCE TO MONOGRAPHIC NOTE.

Increase of hazard as avoiding policy of fire insurance: 66 Am. St. Rep. 691-695.

avoids the policy absolutely, although the mortgage was paid off and canceled prior to the loss.

If an insurance policy is conditioned to be void if the property is, or becomes, encumbered with a chattel mortgage, it is, in Texas, rendered invalid and forfeited by the existence of such mortgage at the time of the issuance of the policy, although the insured discharges such mortgage on the following day and long prior to the loss: *Insurance Co. v. Wicker*, 93 Tex. 390, 54 S. W. 300, 55 S. W. 740.

Use of Premises.—It may be stated as a general rule that though a policy of fire insurance contains a condition avoiding it if the premises are put to a changed use, or if certain prohibited articles are placed thereon, nevertheless a change in the use of the insured premises, or the keeping of prohibited articles thereon without the consent of the insurer, if abandoned or discontinued before the loss occurs, renders the insurer liable where he has not declared a forfeiture of the policy before loss, and the increased hazard caused by such prohibited use in no way continues to affect the risk at the time of loss. In such case the insurance is merely suspended during such prohibited use of the premises, and revives immediately upon its discontinuance. This rule has been long and uniformly adhered to in Illinois: *New England etc. Ins. Co. v. Wetmore*, 32 Ill. 221; *Schmidt v. Peoria etc. Ins. Co.*, 41 Ill. 295; *Insurance Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Insurance Co. v. Garland*, 108 Ill. 220-226; and is excellently stated in *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, where it is held that a change in the use of the insured property increasing the hazard, and for which a forfeiture might be declared under the conditions of the policy, does not prevent a recovery, if such use has been abandoned without declaration of forfeiture by the company before a loss occurs, and such increase of hazard in no way continued to affect the risk at the time of loss. Thus, if the policy provides that, "if after insurance is effected, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect," the words must be construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and when it terminates by discontinuance, the policy is revived and the liability of the insurer again commences: *Schmidt v. Peoria etc. Ins. Co.*, 41 Ill. 295; *Insurance Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497. In the case of *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, it appeared that the policy provided that if the building insured should be used, during the existence of the risk, for any occupation, or for the purpose of storing therein any goods denominated hazardous or extrahazardous within the conditions annexed to the policy, then the policy should at once cease and be of no force, and it further appeared that the insured, during the existence of the risk, used such building for an occupation denominated extra-

hazardous, but that before the loss he had ceased to use it for that purpose, and it was held that the insured was not thereby precluded from recovery under the policy. The doctrine that the keeping of articles denominated as hazardous in a policy of insurance, after the issuance of the policy, if prohibited by it, does not render the policy void, but only suspends it while the prohibited articles are kept on the premises, is adopted in *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9, 81 Am. Dec. 521. In *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536, the insured was bound by the terms of his policy to give notice to the insurer if anything should occur by the acts of others to increase the risk, and the insurer thereupon had the right, at his option, to terminate the policy. The risk was thus increased and the insured failed to notify the insurer. The cause of the increased risk was afterward removed. The house subsequently burned, but the fire originated from causes in no way connected with facts by which the risk had been increased, and it was held that, as it could not be assumed with certainty that the insurer, if notified, would have terminated the insurance, liability under the policy continued. In *United States etc. Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325, the policy in suit prohibited the property insured from being put to other uses than those enumerated in the policy, and provided forfeiture as the penalty for such prohibited use. The property was put to a prohibited use during the life of the policy, but this had ceased from two to four months before a loss by fire occurred, and it was decided that the policy was merely suspended during the prohibited use of the premises, and was revived when that use ceased; and that the insurer was liable under the policy. To the same effect is the case of *Garrison v. Farmers' Fire Ins. Co.*, 56 N. J. L. 235, 28 Atl. 8. The rule that a change in the use of the property which increases the risk after the contract of insurance is made, merely suspends the insurance during its continuance, and that when such use ceases the policy revives, and the insurer again becomes liable for a subsequent loss, is recognized and applied in *Cumberland Valley etc. Ins. Co. v. Schell*, 29 Pa. St. 31. In *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407, it appeared that the insured introduced gasoline on the premises for the purpose of lighting; that this was named in the policy as increasing the risk and avoiding the policy; that the insured afterward removed the gasoline; and that the building was subsequently destroyed by fire. It was held that the policy was not void, but that it had revived, and that the insurer was liable.

A single brief violation of the terms of the policy for the necessary work incidental to the preservation of the insured premises cannot be considered a breach of the condition which prescribes the use of the property, so as to exonerate the insurer from liability for a loss which subsequently happens: *Krug v. German Fire Ins. Co.*, 147 Pa. St. 272, 30 Am. St. Rep. 729, 23 Atl. 572. Although the insured property has been put to a prohibited or illegal use after

the issue of the policy, which under the conditions contained therein avoids it, the policy is not avoided by such use if the latter is discontinued prior to the loss, when the insurer has not taken advantage of the forfeiture clause in the policy before the loss. "There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. The doctrine that the risk may be suspended and again revive without an express provision for that purpose seems to be within the strictest juridical principles": *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737. The doctrine of this case has been at least severely questioned, if not entirely overruled, by subsequent Massachusetts cases which will be noticed hereafter.

If insurance on a vessel provides that she shall navigate certain waters, but contains no provision expressly avoiding the policy for navigating outside of such permitted waters, and the vessel afterward makes a trip outside such permitted waters, and returns in safety, and is afterward burned, the loss in no way caused by such departure, the only effect of the deviation is to relieve the insurer of any loss happening outside of the permitted waters, and he is liable for a subsequent loss covered by the policy not caused or contributed to by such deviation, and happening after the safe return of the vessel therefrom: *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98. And if the policy expressly excepts the navigation of certain waters, and such forbidden waters are in fact navigated by the insured vessel, after which she returns safely to port, the insurer is liable on the policy: *Greenleaf v. St. Louis Fire Ins. Co.*, 37 Mo. 25. The contrary and opposite rule is announced, however, in *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571, 8 Am. Rep. 571, and in *Burgess v. Equitable Marine Ins. Co.*, 126 Mass. 70, 30 Am. Rep. 654.

Discontinuance before loss of a changed use of the insured property involving increase of risk does not entitle the insured to recover, if at the time of loss there remains an increased hazard growing out of the former changed conditions: *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255. Some cases maintain that if a policy of insurance contains a provision that it shall be void upon the breach of a condition contained therein, the breach of such condition wholly avoids the policy without further act on the part of anyone, and the insurance is never restored, although the breach of condition is wholly past at the time of the loss, the property has been restored to its original condition, and the breach in the condition in the policy has in no way contributed to the loss. Thus, in *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 54 N. W. 18, it was held that if the policy provides that it shall be void upon the breach of a specified condition, the insurer's exemption from liability becomes absolutely fixed as soon as that condition is broken, and does not depend upon whether he notifies or

omits to notify the insured after such breach what action he intends to take in regard to the continuance or forfeiture of the policy. Again, in *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530, it was maintained that a provision in a fire insurance policy, that if the insured property should be used for carrying on any hazardous business, the policy should be void, was a prospective warranty, and if violated the policy is avoided, though such use is not continued up to the time of the loss. To the same effect is *Jennings v. Insurance Co.*, 2 Denio, 75. If the policy provides that it shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use such article in a partial, limited, or temporary way can be inferred, full effect must, in New Hampshire, be given to the prohibitive clause by a forfeiture of the policy for its violation, although the prohibited use is discontinued before the loss: *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582. If a policy provides that it shall be void if the risk is increased without the consent of the insurer, and the insured for most of the term of the policy uses the premises, for the illegal sale and keeping of liquors, but before the loss obtains a license to sell such liquors, the policy is not, in Massachusetts, merely suspended during the continuance of such illegal use increasing the risk, but the insurer may treat the policy as entirely void: *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 21 N. E. 361. If the policy provides that it shall become void if, without notice to the insurer, and its permission indorsed thereon, mechanics are employed upon the insured premises, altering or repairing them, the insurance becomes void by the mere fact of the employment of mechanics in such premises, altering or repairing them, without the consent of the insurer, and he is not liable for damage or injury to the insured property thereafter caused by fire, although not happening in consequence of the alterations or repairs, but after they are entirely finished and completed. Where the policy contains a condition similar to one enumerated, it is generally held that the mere breach of the condition absolutely avoids the policy, and that it does not merely suspend it during the time of making alterations or repairs: *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen, 329; *Hill v. Middlesex Mutual Assur. Co.*, 174 Mass. 542, 55 N. E. 319; *Frost etc. Works v. Millers' etc. Ins. Co.*, 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. Rep. 379. This doctrine is denied in *Insurance Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497, where it is held that an increase of hazard caused by repairs upon the insured property merely suspends the policy while it continues, and that liability thereunder is restored when the repairs are completed.

Other Insurance.—If the policy provides that other insurance on the same property, whether existing at the date of the execution of the policy or afterward obtained, shall avoid the policy if ob-

tained without the consent of the insurer, the general rule is, that the cancellation of such other insurance before the loss, though obtained in violation of the contract, restores the insurance policy containing such condition, and the liability of the insurer thereunder is not affected by such violation: *N. E. Fire etc. Ins. Co. v. Schettler*, 38 Ill. 167; *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489; *Western Assur. Co. v. Mason*, 5 Ill. App. 141; *Phenix Ins. Co. v. Johnston*, 42 Ill. App. 66; *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573; *Jacobs v. Equitable Ins. Co.*, 19 U. C. Q. B. 250. This rule, however, is denied in *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, and *Fabyan v. Union etc. Ins. Co.*, 33 N. H. 203, where it is held that if a clause in an insurance policy provides that it shall become void if other insurance is procured without the consent of the insurer, the breach of such clause terminates, and not merely suspends, the policy, and it is not revived without the consent of the insurer, although the additional insurance expires before any loss.

Vacancy.—Generally speaking, a policy of insurance upon a building against loss by fire containing a condition that if the insured shall allow such building to become vacant and unoccupied and so remain, for a specified time, does not become absolutely void by reason of the premises becoming vacant and unoccupied. To render it void upon the happening of such event the insurer must declare the forfeiture, and if he does not exercise this power while the insured is in default, and the premises are again occupied, the right to declare the forfeiture ceases, the insurance is restored, and liability under the policy again attaches: *Insurance Co. v. Garland*, 108 Ill. 220; *Schuermann v. Dwelling-House Ins. Co.*, 57 Ill. App. 200; *Laselle v. Hoboken Fire Ins. Co.*, 43 N. J. L. 468; *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525; *Aetna Ins. Co. v. Meyers*, 63 Ind. 238; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116. In *Moore v. Phoenix Ins. Co.*, 62 N. H. 240, 13 Am. St. Rep. 556, it was held that a policy rendered void by a violation of a condition that the insured building shall not be unoccupied for a period of more than ten days without the insurer's consent is not revived by the subsequent occupation of the building. And to the same effect is the case of *East Texas Fire Ins. Co. v. Kemper*, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122.

Temporary Alienation.—If the policy contains a condition that it shall become void upon the alienation of the insured property, without the consent of the insurer, it has been generally held that if the insured sells or assigns the property during the existence of the policy, without the consent of the insured, the insurance does not, from that fact alone, become absolutely void, but is merely suspended, and if the insured reacquires the title before the loss, the policy is renewed and the insurer becomes again

liable: *Power v. Ocean Ins. Co.*, 19 La. 23, 36 Am. Dec. 665; *Hitchcock v. North Western Ins. Co.*, 26 N. Y. 68; *Lane v. Maine etc. Ins. Co.*, 12 Me. 44; 28 Am. Dec. 150; *Worthington v. Bearse*, 12 Allen, 282, 90 Am. Dec. 152; *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 380.

WASHBURN-HALLIGAN COFFEE COMPANY v. MERCHANTS' MUTUAL FIRE INSURANCE COMPANY.

[110 Iowa, 423, 81 N. W. 707.]

INSURANCE—WAIVER OF PROOF OF LOSS.—A provision in a fire insurance policy that no officer or agent of the insurer shall have power to waive any condition therein unless such waiver is attached to the policy and approved by the secretary of the insurer, does not prohibit such secretary from otherwise waiving the furnishing of proofs of loss by the insured.

INSURANCE—WAIVER OF PROOF OF LOSS.—If the secretary of the insurer writes to the insured informing him that as soon as his proof of loss is made out by another insurer, liable on a concurrent policy, he will make out proof of loss and send it to the insured to be signed, and subsequently requests a statement from the insured as to the items and values of loss as adjusted by such other insurer from which to make up proof of loss, and such statement is promptly furnished, subsequently to which he denies all liability for the loss, without withdrawing his offer to furnish proof of loss, he thereby waives a condition in the policy requiring the insured to furnish proof of loss.

INSURANCE.—CONCURRENT INSURANCE means any insurance running with that of the defendant insurer and sharing its risk, and includes policies covering, not only a part of defendant's risk, but all of it and more. "Other concurrent insurance permitted," in the absence of any limitation in amount, should not be construed to require the later policies to exactly concur in covering all of the insured property, nor in covering all the period of time of the insurance.

McVey & McVey, for the appellant.

Cook & Dodge, for the appellee.

424 LADD, J. The property insured burned March 23, 1896, and proofs of loss were not furnished until May 25th following—more than sixty days thereafter. As a condition precedent to the maintenance of the action, it was incumbent upon the plaintiff, in the absence of any waiver, to prove that it had "given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred," so far as they were within his knowledge, and the extent of the loss, which notice must be given within sixty days

from the time the loss occurred: Acts Eighteenth General Assembly, c. 211, sec. 3; Code, sec. 1744. The numerous provisions of the contract concerning proofs of loss need not be set out, as they are superseded by this statute: *Warshawky v. Anchor etc. Ins. Co.*, 98 Iowa, 221, 67 N. W. 237; *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 338, 32 N. W. 369. Repeating in the policy its conditions neither added to nor detracted from the obligation of either party, and unless waived by the correspondence of the secretary of the defendant, as averred by the plaintiff, there can be no recovery. We have for solution, then, two questions: 1. Had the secretary authority to waive? And 2. Did he do so?

2. All letters addressed to the company were answered by the secretary, who appears to have acted as its mouthpiece in the transaction involved in this suit, and we understand his authority to waive proofs of loss to be conceded, but for the stipulation contained in the contract that "no officer, agent, or other representative of this company shall have power to waive any provision or ⁴²⁵ condition of this policy, except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, and approved by the secretary." A similar provision may be found in the company's by-laws. It would seem that, by requiring the approval of the secretary of any such waiver, he is excluded from those who may only waive in writing; for it could hardly have been contemplated that he would first write this out, and then approve what he had done. But, as the provisions are sweeping, we prefer to put our conclusions on another ground. This stipulation relates to the conditions and provisions of the policy, and not to their performance; or, as put in numerous authorities, it "applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue on his contract, such as giving notice and furnishing preliminary proofs." We believe it to have been uniformly so held when attention has been directed to this particular point: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 417, 9 Am. St. Rep. 216, and valuable note on page 234, 18 Pac. 758; *New Orleans Ins.*

Assn. v. Matthews, 65 Miss. 301, 4 South. 62; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Blake v. Exchange etc. Ins. Co.*, 12 Gray, 265; *Carson v. Jersey etc. Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 285; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *Susquehanna etc. Ins. Co. v. Staats*, 102 Pa. St. 529; *Universal etc. Ins. Co. v. Weiss*, 106 Pa. St. 20. The conditions contemplated are of the essence of and form a part of, the contract ⁴²⁶ of insurance, upon which its continuing force depends. Under a valid policy, liability attaches on the happening of the loss, and evidently the requirement of proofs of loss pertains, not to the provisions of the policy, but to the performance of them: *Blake v. Exchange etc. Ins. Co.*, 12 Gray, 265. Furnishing proofs within a limited time certainly is of the procedure to enforce the terms of the contract, and is by the statute, independent of policy, a condition precedent to the maintenance of an action. We do not overlook *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 48 Am. St. Rep. 454, 57 N. W. 952, and *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 326, 60 N. W. 663. In these cases the validity, only, of such stipulation, and not its applicability, was considered, as clearly appears from an examination of the authorities cited. The decision in the former rests, without stating the reasons, on three cases: *Zimmerman v. Home Ins. Co.*, 77 Iowa, 691, 42 N. W. 462, and *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660 (each holding that forfeiture because of additional insurance could not be waived by a local agent), and *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34 (announcing the same rule in case of forfeiture because of the execution of a mortgage). We shall not review in detail the cases cited in *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 326, 60 N. W. 663. Suffice it to say that all but two relate to the provisions of the contract, and not to the performance of same after loss. The two are the *Kirkman* case and *Smith v. Niagara etc. Ins. Co.*, 60 Vt. 682, 6 Am. St. Rep. 144, 15 Atl. 353. In the latter, again, only the validity of the stipulation was considered, and the decision bottomed on New York, Massachusetts, and Michigan cases in which the facts related only to the continuance of the contract in force: See, also, *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, 43 N. W. 954. The fact that our statute has superseded all requirements of the

policy relating to proofs of loss, rendering these mere surplusage, furnishes an additional reason for saying that such a stipulation does not concern the performance of the provisions ⁴²⁷ of the policy after loss. Furnishing proofs is a matter of form, something like the demand required in certain cases. As said in *Blake v. Exchange etc. Ins. Co.*, 12 Gray, 265: "If the plaintiff relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to a liberal application of this principle is necessary to the maintenance of good faith and fair dealing in judicial proceedings." The point was not made or considered in the *Kirkman* and *Ruthven* cases, and for this reason we are more readily persuaded of our duty not to follow them. Former decisions should only be disturbed on great consideration, for courts have no assurance of being wiser than their predecessors. But when the applicability of a rule of law is lost sight of, because not questioned, in passing upon its validity, there is no just ground for halting in reaching a right conclusion, in harmony with the voice of reason and authority; for in such event the point has never been determined, save inferentially.

3. That proofs of loss were in fact waived, the record bears conclusive evidence. This was done—1. By leading the plaintiff to rely on the defendant for their preparation; and 2. By the denial of liability. March 28th the secretary of the defendant requested "the name and amounts of the companies covering on furniture and fixtures concurrent with our policy." April 4th the secretary advised the plaintiff that the company had made arrangements with the State Insurance Company to look ⁴²⁸ after the loss through their adjuster, "who they informed us was then at your place, and it would not be necessary that we go to the expense of sending an adjuster down; that they would let us know as soon as their proofs were ready, and we could make out proofs, and send direct to you to be signed. This, as I understand, is a total loss, and we think it hardly necessary

to go to an extra expense in the matter, as papers can all be forwarded to you and be signed up as well without us as with us on the ground, and will be mailed to you as soon as we can hear from the State Insurance Company in regard to the matter, which will be no doubt very soon if their adjuster has returned home, and we shall look after this matter, and let you hear from us promptly in reference to it." April 25th he requested "a statement showing the items, value of each as adjusted by the State and Security insurance companies, together with a copy of the form or written portion of each of their policies, from which we may be able to make up proofs of loss." In response to this the plaintiff sent "a statement of the basis on which the Security settled," and copies, as requested. April 25th, the secretary, after referring to adjustments of the other two companies, added: "We wish to have you explain why there should be any difference in the adjustment of this loss under the three policies mentioned. To our minds, there seems to have been some very fine figuring behind the scenes somewhere, and we must have an explanation, so as to enable us to make out our proofs intelligibly; and if you are unable to give us the particulars, and also an itemized statement of your loss, it perhaps will then be necessary to look somewhere else for the information required under the policy and contract." The plaintiff responded with explanation, adding: "This looks to us as though there should be no question but what you should pay the full two thousand dollars insurance. If this explanation is not satisfactory, we see no other way than to have you come here and go over it yourself, as we have no fear of not being able to convince you that we are entitled to the face of the policy." These letters of the secretary were all in ⁴²⁹ response to communications addressed to the defendant company; and the plaintiff had the right to assume, in the absence of knowledge to the contrary, that he was authorized to act in its behalf. The promise contained in that of April 4, 1896, that proofs of loss would be prepared and sent to the assured for signature was never withdrawn or modified, and was tantamount to saying that these need not be prepared by the plaintiff: *Scott v. Security Fire Ins. Co.*, 98 Iowa, 67, 66 N. W. 1054. True, facts and items were called for, but only to enable the defendant to do as agreed. The last letter on the subject contains no intimation to the contrary, merely suggesting the necessity of the defendant looking "elsewhere for the information required under the policy." The claim of appellant that there was any subsequent re-

quest for proofs of loss has no support in the record; and we think that the defendant, in promising to prepare them, relieved the plaintiff from so doing, thereby waiving the requirements of the statute. And, in the light of the previous correspondence, the last letter of the secretary, dated May 13, 1896, was such a denial of liability as to dispense with such proofs. Omitting the formal parts, it reads: "We now avail ourselves of the first practical opportunity to carefully examine and to reply to your several letters and inclosures, and the information therein contained in reference to your loss, which occurred on the twenty-third day of March, 1896. Upon examination of the three schedules attached to the three policies, we find that the insurance was not concurrent with ours, as required by our policy." It must not be forgotten that "the letters, inclosures, and information" referred to had been sent to the company to enable it to carry out its promise to prepare proofs; that the plaintiff had persistently urged the adjustment of the loss; that the policy provided that, "unless otherwise provided by agreement indorsed hereon or added hereto, it shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that indorsed thereon were the words, "Other concurrent ⁴³⁰ insurance permitted." In view of these facts, what does this letter mean? Can the purpose of the secretary to declare the policy void be questioned? With what object was the letter written? Clearly, to deny liability. With everything before him, why were proofs not forwarded as agreed? Evidently, as according to his view the policy was void, these were unnecessary. If the purport of this letter is not denial of liability, what could have been the object in writing it? True, it was not a candid expression of the company's purpose, but, as said, in view of the previous correspondence, its meaning was apparent. Denial of liability must be unequivocal, as contended by appellant, but not necessarily in express language. If all the correspondence, considered together, establishes such denial, it is quite enough: *Parsons v. Grand Lodge*, 108 Iowa, 6, 78 N. W. 676; *Bloom v. State Ins. Co.*, 94 Iowa, 363, 62 N. W. 810; *Soorholtz v. Marshall Co. etc. Ins. Co.*, 109 Iowa, 522, 80 N. W. 542.

4. Was this policy concurrent with those of the other two companies? If not, under the provisions of the policy already quoted it was void from its inception. The written portion of defendant's policy was as follows: "Two thousand dollars on

their electric motor and connections, coffee roasters and their foundations, arches, casings, coffee, mustard, and spice grinding mills, coffee-cleaning mills, printing press, type, belting, chases, fan coolers, cooling fans, trucks, scales, scoops, coffee bins, pipes and pulleys, and other movable and fixed machinery, safe, desk, chairs, typewriting machines, letter press, stationery, and all other office fixtures, tea cans, sample cases, all while contained in the three-story brick building situated at No. 115 and 115½ East Second street, Davenport, Iowa. Other concurrent insurance permitted."

That contained in policies of the State and Security companies reads: "\$1,000 on their boilers, engine, and coffee roaster, foundations and connections, casings and arches, fixtures, and appurtenances, other fixed and movable ⁴³¹ machinery, shafting, gearing, pulleys, belting, trucks, and scales, while contained in the three-story brick, metal-roof building, situated Nos. 115 and 115½ East Second street, Davenport, Iowa. Other Con. Ins. Per." It will be noticed that the policy sued on covers all the property described in the others, with the possible exception of boilers, and much more. The defendant contends that, to be concurrent, the insurance must cover the identical property, and no other. A different conclusion was reached in *Corkery v. Security Fire Ins. Co.*, 99 Iowa, 382, 68 N. W. 792. True, that decision was somewhat influenced by a provision in the contract indicating that other insurance might "be specific or by general or floating policies"; but that was referred to as obviating the objection that, where identical property is not covered by all policies, much difficulty would be experienced in adjustment of a loss. Such a difficulty does not furnish a good reason for not carrying out the terms of the contract. At least two text-writers of repute assume the meaning of "concurrent" to be as contended by appellant, and then state the difficulty mentioned as a ground therefor: *Joyce on Insurance*, sec. 2480; *Ostrander on Insurance*, sec. 564. Nor do we think *East Texas etc. Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713, so holds. The policy of one thousand dollars there sued on was issued on property insured for three thousand dollars, and contained the clause, "Total concurrent insurance, four thousand dollars." Without consent, the insured procured another policy of one thousand dollars, and it was held that, as this exceeded the insurance authorized, there could be no recovery. After quoting definitions from the dictionaries, the court said: "To be concurrent, the insurance must operate at the same time, upon the

same property, and look to the same indemnity of the insured in case of its loss or destruction from casualty insured against." But the policies in that case covered precisely the same property, and the question under consideration was not involved. Here the clause "other concurrent insurance permitted" did no more than wipe out the prohibition ⁴³² of the policy. The hazard of excessive insurance was entirely waived, and, in so far as the risk was concerned, it was immaterial whether the additional insurance was on one or all the items covered by the defendant's contract. "Concurrent insurance," under the circumstances, means any insurance running with that of the defendant, and sharing its risk. If so, it would include policies covering not only a part of defendant's risk, but all of it, and more. The definitions of the lexicographers warrant such a conclusion. Take that of Webster, as quoted in the Corkery case: "Concurrent: Acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying; conjoined; associate; concomitant; joint and equal; existing together, and operating on the same objects." Might not the assured reasonably understand from this the meaning as we have stated it? It must be borne in mind that, as the contract is prepared solely by the insurer, it must be construed most strongly against the defendant: *Miller v. Mutual etc. Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Read v. State Ins. Co.*, 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665. The policies were concurrent as to time, though one was for a shorter period than the other. They were concurrent as to the particular property covered by both. In other words, the additional insurance was concurrent in certain respects, though not as to every detail. We are of opinion that the clause, "Other concurrent insurance permitted," in the absence of any limitation in amount, should not be construed to require the later policies to exactly concur in covering all of the property. Otherwise, it should be held that they must also cover all the time. An ordinary man, reading the contract with this clause, in the light of the recognized definitions of "concurrent," would not attribute a meaning to the word such as the defendant insists should be given it; and surely the insured cannot be held to have understood it in such a restricted sense. The reasoning of the court in *Gough v. Davis*, 24 Misc. Rep. 245, 52 N. Y. Supp. 947, supports these ⁴³³ views. The authorities determining when insurance is double throw little light on the ques-

tion. Besides, these are in conflict; the supreme court of Pennsylvania holding that the policies, to constitute double insurance, must cover identically the same property (*Clarke v. Western Assur. Co.*, 146 Pa. St. 561, 28 Am. St. Rep. 821, 23 Atl. 248), while that of New York, in overruling an earlier case, has adjudged it double insurance if one policy includes only a part of the property covered by the other: *Ogden v. East River Ins. Co.*, 50 N. Y. 388, 10 Am. Rep. 492. See *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477; *Howard Ins. Co. v. Scribner*, 5 Hill, 298. We discover no error in the record, and the judgment is affirmed.

Granger, C. J., not sitting.

Waterman, J., took no part.

INSURANCE—WAIVER OF PROOF OF LOSS.—A clause in a policy of insurance, prohibiting any waiver unless indorsed on the policy, has no reference to stipulations to be performed after a loss has occurred, such as giving notice and preliminary proofs: *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415, 9 Am. St. Rep. 216, 18 Pac. 758. Any disavowal by an insurance company of its liability avoids the necessity of furnishing proofs of loss: *Wilson v. Commercial etc. Assur. Co.*, 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245; *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

NICHOLS v. EATON.

[110 Iowa, 509, 81 N. W. 792.]

LIBEL—PRIVILEGED COMMUNICATION.—A communication by an insurance company to its soliciting agent charging an examining physician with forgery in an application for insurance, and informing such agent that another examining physician would be appointed, is upon a subject relating to the agency involving a mutual interest, and is a privileged communication, and if made without malice is not actionable.

LIBEL — PRIVILEGED COMMUNICATIONS — MALICE — BURDEN OF PROOF.—If a communication alleged to be libelous is shown to be privileged, the burden of proof is cast upon the plaintiff to show malice in fact, and this, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to show fact and motive, is a question to be determined by the jury.

LIBEL — PRIVILEGED COMMUNICATIONS — MALICE.—If in actions for libel the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of privilege is material only as bearing upon the question of malice in fact, and the jury may find the existence of such malice from the language of the communication itself, or from extrinsic evidence.

LIBEL — PRIVILEGED COMMUNICATIONS — MALICE — EXCESS OF PRIVILEGE.—In an action for libel founded upon a privileged communication, the question whether there is such excess of privileged statement as to constitute malice in fact is for the jury to determine from the communication and the surrounding circumstances.

A. H. Evans, Carr & Parker, and G. R. Sanderson, for the appellant.

Guernsey & Granger, for the appellee.

510 DEEMER, J. Appellant is a life insurance association incorporated under the laws of Iowa, with its principal place of business at Des Moines. Defendant Eaton was its medical director, and one Dohaney was its clerk and bookkeeper. W. T. Botts was soliciting agent for the association at the town of Higbee, Missouri, and plaintiff was its medical examiner at that place. The application of one A. P. Milnes for insurance was prepared by plaintiff, signed by the applicant, and turned over to the soliciting agent, Botts, after plaintiff had examined Milnes. The application was then forwarded to the defendant company. After being received by the association, it was given to the medical director, Eaton, who made some minutes thereon, and passed it to Mr. Dohaney, to prepare and forward an answer. Dohaney prepared, addressed, and mailed the following to Botts, the soliciting agent:

“Des Moines, Iowa, Jan. 11, 1896.

“W. T. Botts, Higbee, Mo.

“Dear Sir: I write you in reference to medical examiner at Higbee. I have before me the application of Adolphus P. Milnes. This application shows on the face of it to be a forgery of his signature, and it is written by Dr. Nichols instead of the applicant. He has fallen down in his undertaking to imitate the handwriting of the applicant, by his misspelling the name. We have returned the application to the doctor, and given him to understand that it must be corrected at once; and you are hereby notified that in the future no more examinations will be accepted when made by Dr. Nichols. We will appoint another physician at your place, and will notify you of appointment of same. We have no longer any confidence in Dr. Nichols, and, as above stated, we cannot accept any more examinations made by him.

“Very resp. yours,

“CHAS. WOODHULL EATON,

“Medical Director.”

The court, after stating defendant's claim that the letter was privileged, instructed as follows: "And, as to ⁵¹¹ this claim of the said defendant, you are instructed that the said letter or communication, made and published in the manner and under the circumstances under which the same was made and published, was not a privileged communication, and the circumstances under which the same was made and published did not justify the defendant in so making and publishing the same." It further instructed that the letter was libelous per se, and that the only matter for the jury to consider was the amount of damages. Claim is made that the instructions are erroneous, for the reason that the letter was conditionally privileged; that is to say, that the occasion was such as to rebut the presumption of malice arising from the publication, and to cast the burden on plaintiff of proving malice in fact. On the other hand, it is contended that the occasion was not privileged, and that, if privileged, the communication was in excess of the privilege. Privileged communications or publications are of two kinds: 1. Absolute; 2. Conditional or qualified. When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it was published. When qualified, however, the plaintiff may recover if he shows that it was actuated by malice. In determining whether or not the communication was qualifiedly privileged, regard must be had of the occasion, and of the relationship of the parties. One may make a publication to his servant or agent, without liability, which, if made to a stranger, would be actionable. In the protection of his own interests, one may make a communication to his agent or servant without subjecting himself to liability, unless he exceeds the privilege, and does more than his duty or interest demands. Again, when one has an interest in the subject matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made in order to protect such common interest is privileged, by reason of the occasion. Generally, this interest must be a ⁵¹² pecuniary one, but it may arise out of the relationship or status of the parties. The statement must be such as the occasion warrants, and must be made in good faith to protect the interests of the publisher and the person to whom it is addressed. A communication by a principal to his agent touching the business of the agency is not actionable, without proof that the principal was actuated by malice toward the person to whom the communication relates.

Now, the evidence in this case does not show very clearly whether the Milnes application was forwarded to the association by plaintiff or by the soliciting agent. From the fact that the letter regarding the application was sent to Botts, it would appear that he had sent the application. But, be this as it may, Botts, as soliciting agent, was entitled to know who was the accredited medical examiner of the association at the town where he was taking applications. The company also had the right to inform its soliciting agent of the discharge of its medical examiner in the locality where the soliciting agent was operating. The occasion was undoubtedly privileged, and it was the duty of the court to so instruct the jury. Appellee says that, conceding the occasion was privileged, defendant went beyond the privilege, and rendered itself liable. This argument presents a question that is new to this court, and one on which the authorities are in apparent conflict. Decision of the point involves a consideration of the reasons underlying the doctrine of privilege. Ordinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a *prima facie* case of malice in the author. But a privileged communication is an exception to the rule. In such case the presumption of malice is rebutted, and the burden of proving the existence of this element of the action is on plaintiff. In other words, actual malice must be shown: *White v. Nicholls*, 3 How. 286; *Briggs v. Garrett*, 111 Pa. St. 414, 56 Am. Rep. 274, 2 Atl. 513; *Bearce v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411. *Bacon v. Michigan Cent. R. R.* 513 Co., 66 Mich. 166, 33 N. W. 181, is an instructive and well-considered case on this point. It is there said: "The meaning in law of a privileged communication is that it is made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of plaintiff, and throws on him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. . . . The effect, therefore, of showing that the communication was made on a privileged occasion is *prima facie* to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact (that is, that the defendant was actuated by ill-will in what he did and said, with a design to causelessly or wantonly injure the plaintiff); and this malice in

fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury."

Plaintiff relies on some expressions found in the books to the effect that, if the communication exceeds the privilege, it destroys the privilege. Thus, Mr. Odgers, in his work on Slander and Libel, says: "But it must be remembered that, although the occasion may be privileged, it is not every communication made on such occasion that is privileged. 'It is not enough to have an interest or duty in making the communication. The interest or duty must be shown to exist in making the communication complained of': Per Dowse, B., 6 L. R. Ir. 269. A communication which goes beyond the occasion exceeds the privilege": Page 197. Again, at page 245, it is said: "So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject matter thereof, the defendant must be careful not to branch out into extraneous matter with which such person is unconcerned. ⁵¹⁴ The privilege only extends to that portion of the communication in respect to which the parties have a common interest or duty." We have recognized some of the rules here announced: See *State v. Haskins*, 109 Iowa, 656, 77 Am. St. Rep. 560, 80 N. W. 1063. There the occasion was not privileged, because made to persons who were in no manner interested in the publication. The doctrines announced by Mr. Odgers, some of which are even stronger than we have quoted, have produced some confusion in the authorities; and we think the better rule is that if the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of statement is material only as bearing on the question of malice. Indeed, the jury may find the existence of malice from the language of the communication itself, as well as from extrinsic evidence: *Hastings v. Lusk*, 22 Wend. 410-421, 34 Am. Dec. 330; *Nevill v. Insurance Co.*, [1895] 2 Q. B. 156; *Missouri Pac. Ry. Co. v. Beehe*, 2 Tex. Civ. App. 107, 21 S. W. 384. Whether the publication is or is not privileged by reason of the occasion is a question of law, for the judge alone, where there is no dispute as to the circumstances under which it was made. If the judge decides that the occasion was one of qualified or conditional privilege only, the plaintiff must then, if he can, give evidence of actual malice on the part of the defendant. If he does give any evidence, which, as we have said, may be gathered from the publication itself, the question of bona fides becomes one of fact

for the jury: 1 American Leading Cases, 5th ed., 193; Gray v. Pentland, 4 Serg. & R. 420; Hart v. Reed, 1 B. Mon. 166. 35 Am. Dec. 179; Newell on Slander and Libel, 478. In Hill v. Durham House Drainage Co., 29 N. Y. Supp. 427, it is said: "In case a communication is prima facie privileged, the existence or non-existence of malice on the part of the defendant is a question of fact; and the plaintiff, before he can recover, must affirmatively establish to the satisfaction of the jury that the publication complained of was made through malice. This may be shown from the communication, the circumstances under ⁵¹⁵ which it was written, and it may be inferred from a variety of facts. . . . The occasion was privileged. Did the publication go beyond the occasion, or, in other words, was more written than the occasion justified? This depends upon the terms of the communication, and the facts outside of it, and was an issue of fact for the jury": See, also, Comfort v. Young, 100 Iowa, 627, 69 N. W. 1032; Strode v. Clement, 90 Va. 553, 19 S. E. 177; Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360.

The instructions given by the trial court were, for the reason stated, erroneous. We do not overlook the plaintiff's claim that the question is not raised by proper assignments of error. An examination of the record convinces us that they are sufficient.

2. Defendants contend that the answer tendered an issue as to the authority of the agent to write the letter, and that the court erred in not submitting that issue. We do not think the record sustains their claim. The writing of the letter was admitted, and we find no pleading questioning the authority of the writer to bind the company. For the reasons pointed out the judgment of the district court is reversed.

Granger, C. J., not sitting.

LIBEL—PRIVILEGED COMMUNICATION.—A communication made in good faith in reference to a matter in which the person communicating has an interest is privileged when made to another for the purpose of protecting that interest: Missouri etc. Ry. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555; Rothholz v. Dunkle, 53 N. J. L. 438, 26 Am. St. Rep. 432, 22 Atl. 193. A qualified privilege exists where some communication is necessary and proper to protect a person's interest, but this privilege may be lost if the extent of its publication is excessive: Smith v. Smith, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 477.

LIBEL—EXCESS OF PRIVILEGE.—If a communication contains expressions that exceed the limits of privilege such expressions are evidence of malice and the case should be given to the

jury: Jackson v. Pittsburgh Times, 152 Pa. St. 406, 34 Am. St. Rep. 659, 25 Atl. 613.

LIBEL—MALICE.—THE BURDEN OF PROVING malice lies on the plaintiff if the matter complained of as libelous is privileged: Bearce v. Bass, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411; Coogler v. Rhodes, 38 Fla. 240, 56 Am. St. Rep. 170, 21 South. 109.

CEDAR RAPIDS NATIONAL BANK v. LAVERY.

[110 Iowa, 575, 81 N. W. 775.]

EVIDENCE—DECLARATIONS OF HUSBAND, WHEN NOT ADMISSIBLE AGAINST WIFE.—Under a statute declaring that neither a husband nor wife shall be a witness against the other except in a criminal prosecution, his declarations, after making a conveyance to her, are not admissible against her for the purpose of showing that it was fraudulent.

FRAUDULENT CONVEYANCES — EVIDENCE. — DECLARATIONS AND ADMISSIONS of a grantor made after a conveyance are not admissible against the grantee in an action to set aside the conveyance as fraudulent.

PARTIES.—MISJOINDER of parties cannot be taken advantage of by demurrer.

Suit in equity to set aside a conveyance from a husband to his wife as fraudulent and to subject the property to the payment of a judgment against him. Section 4606 of the Iowa code, referred to in the opinion, reads: "Neither the husband nor the wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; but in all civil and criminal cases they may be witnesses for each other." Decree for complainants. Defendants appealed.

Welch & Welch, for the appellants.

W. L. Chrissman and Ellison, Ercanbrack & Lawrence, for the appellee.

575 WATERMAN, J. The defendants are husband and wife. On July 26, 1896, the Aultman Company sold one John Lavery a threshing outfit, taking in part payment his three promissory notes, for five hundred dollars each, which notes were signed by defendant Mary Ann Lavery as surety. This action is founded on one of these notes, which was transferred **576** to

plaintiff, and upon which judgment was obtained January 5, 1897. At the time of signing the notes, and to secure the credit for her principal, Mary Ann Lavery made a property statement in writing, which showed, among other things, that she owned real estate in Jones county of the value of nine thousand dollars over and above encumbrances. As a matter of fact, she did at the time own valuable real estate in said county, but on February 13, 1896, she conveyed this to her husband, Hugh Lavery. The present action is brought to set aside this conveyance. The insolvency of Mary Ann Lavery is not disputed. The only evidence tending to show fraud in the conveyance is found in certain admissions made by Mary Ann Lavery in an examination in proceedings supplemental to execution, which was had long after the conveyance was made. Aside from oral testimony as to these admissions, the written report of the referee before whom the examination was conducted was received over defendant's objection. This report does not appear to have been signed by the witness. We think it was inadmissible. But we go further, and say that all of these admissions and declarations of the wife were incompetent as against the husband. Such evidence is forbidden by section 4606 of the code. Chapter 108 of the acts of the twenty-seventh general assembly, upon which plaintiff relies, was not passed until after this cause was disposed of by the trial court. It has no retroactive effect. Another and sufficient reason for ruling out this testimony is that, irrespective of the relationship of the parties, the rule is that the admissions or declarations of a grantor, after conveyance made, cannot be received to impeach the title of the grantee: *O'Neil v. Vanderburg*, 25 Iowa, 104; *Manufacturing Co. v. Johnson*, 50 Iowa, 142; *Bixby v. Carskaddon*, 70 Iowa, 726, 29 N. W. 626; *Bener v. Edgington*, 76 Iowa, 105, 40 N. W. 117; *Allen v. Kirk*, 81 Iowa, 658, 47 N. W. 906; *Neuffer v. Moehn*, 96 Iowa, 731, 65 N. W. 334; *Wait on Fraudulent Conveyances*, sec. 278. With these declarations out of the case, there is no evidence tending to impeach the husband's title.

577 2. While it may be unnecessary to add anything further, it is not out of place for us to say that the demurrer to the petition was properly overruled. It was based on the thought that the wife is not a proper party. We think she is. But, if not, the misjoinder could not be taken advantage of by demurrer: *Dolan v. Hubinger*, 109 Iowa, 408, 80 N. W. 514. For the reasons given, the judgment must be reversed.

Granger, C. J., not sitting.

FRAUDULENT CONVEYANCE.—THE DECLARATIONS of a vendor after making a conveyance are not admissible against his vendee to show fraud: See the monographic note to *Horton v. Smith*, 42 Am. Dec. 632. On the admissibility of declarations of a husband to show that a conveyance by him to his wife is fraudulent, see *German Ins. Co. v. Bartlett*, 188 Ill. 165, ante, p. 172, 58 N. E. 1075; *McGhee v. Wells*, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529; *Barnes v. Black*, 193 Pa. St. 447, 74 Am. St. Rep. 694, 44 Atl. 550.

OLSON v. LEIBPKE.

[110 Iowa, 594, 81 N. W. 801.]

LIS PENDENS—PENDENCY OF APPEAL.—If, in an action to quiet title, being one of a large number of suits brought by the same plaintiff in the same county, all involving a federal question, a decree is rendered against all of the defendants in that and the other suits, after which an appeal is taken in each case under stipulation between all of the parties that appeals in two cases should be finally prosecuted, while the remaining appeals should stand continued until final decision, and after decision by the state supreme court the appeals are prosecuted by writ of error in a federal court, where a final decision is rendered, which is followed by the state supreme court, reversing the decree of the state district court, the action against all of the defendants must be regarded as pending from the time of the filing of the petition in the district court until the last decision by the state supreme court, and a purchaser from the plaintiff pending the appeals in such actions acquires no interest in the property as against defendants, under a statute providing that when a petition is filed affecting real estate the action is pending so as to charge third persons with notice, and that while so pending no interest in the property can be acquired by third persons.

H. E. Long and H. M. Funson, for the appellants.

Botsford, Healy & Healy, for the appellees.

595 SHERWIN, J. In January, 1884, the American Emigrant Company brought an action in the district court of Calhoun county against these defendants Long, to quiet its title to the lands involved in these cases. Issue was joined, and a trial had upon the merits, which resulted in a decree, May 10, 1888, in favor of the emigrant company, quieting its title. An appeal was taken from that judgment, and this ⁵⁹⁶ court, following the holding of the supreme court of the United States in *Rogers Locomotive etc. Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. Rep. 188, reversed the case: *American Emigrant Co. v. Long*, 105 Iowa, 194, 74 N. W. 940, decided April 9, 1898. The plaintiffs purchased in the fall of 1895, and con-

tend that they were purchasers in good faith, for full consideration, and without notice, either actual or constructive, of the defendants' claim of title. The controlling question, therefore, in these cases, is whether the plaintiffs are entitled to be protected as such purchasers. It may be conceded that the plaintiffs, at the time of their purchases, had no actual knowledge of the condition of the litigation between the emigrant company and the Longs, other than what was imparted by the abstract of title. What, then, was the status of the case after the decree in the district court? The records of that court showed that a notice of appeal had been served within the statutory time. The stipulation entered into by the parties, through their attorneys, expressly recognized the sufficiency of the service, and this court held it good in the same case, and that it conferred jurisdiction upon the court to hear and determine the appeal. It follows, then, that at the time of the plaintiff's purchase, in the fall of 1895, the case was pending in this court, and the records of the district court of Calhoun county so showed. The plaintiffs were therefore purchasers pendente lite. Section 2628 of the code of 1873 provided that "when a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's rights, if the real property affected be situated in the county wherein the petition is filed." It will be borne in mind that the defendants had answered in the Emigrant case, claiming adverse title to this particular land, and that the case had been tried upon its merits. This court, in *Ferrier v. Buzick*, 6 Iowa, 258, says: "The purchaser of property actually in litigation, ⁵⁹⁷ pendente lite, for a valuable consideration, and though he may have had no express or implied notice in point of fact, is affected in the same manner as if he had such notice. This rule, though it may in some cases operate with hardship upon a purchaser, is one of general convenience, and is now well and firmly established": Citing cases. See, also, 1 Story's Equity Jurisprudence, 411. The primary object of the rule of *lis pendens* is to keep the property within the power of the court until final judgment or decree shall be entered, and thus enable courts to give force and effect to such judgments: Bennett on *Lis Pendens*, sec. 12; *Murray v. Ballou*, 1 Johns. Ch. 566. "It is founded upon the necessity of such a rule in order to give effect to the proceedings in courts of justice. Without it, the administration

of justice might, in all cases, be frustrated by successive alienations of the property which was the object of litigation, pending the suit, so that every judgment and decree could be rendered abortive, where the recovery of specific property was the object": *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766; *Bennett on Lis Pendens*, sec. 14. The rule under the common law, and the rule which has been generally followed by the courts where there is no statute affecting the question, is that lis pendens continues until the suit is determined by final decree, or until it is suspended by a failure to make what is called a "full prosecution." It is also held that an appeal from a final judgment of an inferior court continues the lis pendens during the pendency of the appeal: *Ferrier v. Buzick*, 6 Iowa, 258; *Washburn v. Van Steenwyk*, 32 Minn. 355, 20 N. W. 324. The question as to what is a "full," or, as some writers put it, "continuous, prosecution of a cause," either in the trial court or in the court to which an appeal is taken, is one which, of necessity, must be determined from the facts appearing in the particular case under consideration. No ironclad rule can be laid down for the government of all cases. The general rule laid down by the authorities is that there must "be a prosecution of the suit without such intermission as may appear to ⁵⁹⁸ be inexcusable, and shall not be satisfactorily explained": 13 Am. & Eng. Ency. of Law, 889, and cases cited in note 2. It is also generally held that, where there is an apparent neglect to prosecute, a reasonable excuse for the delay complained of is always available to keep the lis pendens alive: *Wickliffe v. Breckinridge*, 1 Bush, 443; *Watson v. Wilson*, 2 Dana, 407, 26 Am. Dec. 459. And it is said in *Gossom v. Donaldson*, 18 B. Mon. 237, 68 Am. Dec. 723: "It is not necessary, however, in order to retain the character of a lis pendens, that a suit should be prosecuted with even ordinary diligence; but, as a lis pendens is created by the institution of the suit, it can only be lost by unusual and unreasonable negligence in its prosecution." It has also been held, under the common-law rule, that full prosecution exists so long as the action is pending, and the court has complete jurisdiction over the matter in controversy: *Bennett on Lis Pendens*, sec. 102. If we were to base our conclusion in the cases at bar solely upon the rule established by the common law, we think the evidence presented by the record would fully justify the finding that there was a full and continuous prosecution of the cases. It appears from the record that some fifty suits of a similar nature, brought by the emigrant company, and

all involving a federal question, were at the same time pending in Calhoun county, and, as we understand the record, were all determined at the same time, in some instances for the plaintiff, and in others for the defendants, and all of the cases were appealed. It was afterward stipulated that all of those cases were appealed, naming them, and that "the defendants shall proceed to prosecute their appeals in the following named cases, or such of them as they see fit, not less than two, namely," giving the names of the cases, which list did not include the case against these defendants; and that all of the other appeals above mentioned on both sides shall stand continued, without prejudice to either party, and without being docketed in the supreme court, until the decision of said court in the appeals which may be prosecuted as herein provided. The appeal ⁵⁹⁹ in the case of American Emigrant Co. v. Rogers Locomotive Machine Works was prosecuted and decided by this court October 22, 1891 (83 Iowa, 612, 50 N. W. 52), and was taken to the supreme court of the United States on writ of error, and there decided December 7, 1896 (164 U. S. 559, 17 Sup. Ct. Rep. 188), after plaintiffs purchased. In addition to the written stipulation, Charles A. Clark testified, in the cases at bar, that he had an oral understanding, as he supposed, with Mr. J. J. Davis, attorney for plaintiff, to the effect that the other swamp land cases were to stand over, under the written stipulation, until final decision in the supreme court of the United States in the Rogers Locomotive Machine Works case. This evidence was uncontradicted, and we think was competent, as tending to show diligence on the part of the defendants Long. It was undoubtedly the understanding of the defendants' counsel that the other cases should remain in abeyance until the questions involved had been finally determined in one or more of the cases to be prosecuted upon appeal, under the written stipulation. After the case of American Emigrant Co. v. Rogers Locomotive Machine Works had gone to the supreme court of the United States, where the controlling questions involved in all of the cases which the stipulation covered would be finally settled, the defendants in the cases at bar might well have ceased the active prosecution of their appeal, and awaited this final decision. But, by the very terms of our statute, *lis pendens* commences when a petition has been filed affecting real estate, and continues while the action is pending: *Haverly v. Alcott*, 57 Iowa, 171, 10 N. W. 326; Code, sec. 2628. This positive provision of the statute we can neither enlarge nor diminish.

It stands as the expression of the legislative will on this subject, and must be given its broadest meaning. It was intended to give effect to judicial decrees, and to keep specific property which is in litigation within the power of the court. It is a just statute, and its wisdom cannot be better illustrated than in the cases at bar, where it is sought to take from the defendants valuable ⁶⁰⁰ land, their title to which they have been defending for years, and have finally established by decree of this court. And we now hold that the cause in which such decree was rendered was pending when the plaintiffs purchased, in 1895, and that plaintiffs could not, and did not, acquire any interest in the land in controversy, as against the rights of these defendants. The other questions presented by the record it is not necessary to notice. The judgment of the district court in both cases is right, and both are affirmed.

Granger, C. J., not sitting.

THE LIS PENDENS resulting from the commencement of a suit, whatever may be the form of appellate proceedings therein, continues until its final determination, in whatsoever court that may be: See the monographic note to *Stout v. Philippi etc. Co.*, 56 Am. St. Rep. 876, on the law of lis pendens.

WATSON v. RICHARDSON.

[110 Iowa, 698, 80 N. W. 416.]

JUDGMENTS—RES JUDICATA.—A judgment involving an interest in land is res judicata in an action involving title to personalty, if the vital issue in both actions is the right to inherit as sole heir of a certain person, and the parties and the evidence required in each action are the same.

JUDGMENTS—RES JUDICATA.—An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is announced, but in every other where the right or title is the same, although the cause of action may be different.

JUDGMENTS—RES JUDICATA PENDING APPEAL.—A judgment or decree appealed from is res judicata until set aside, modified, or reversed.

ACTIONS—ABATEMENT.—One action, to be available as plea in abatement to another, must involve the same cause of action, and the fact that it depends upon the same right or title is not sufficient.

Action involving the title to the personalty of Mott Watson, deceased, and petition praying for the distribution of such prop-

erty to G. N. Watson. The defendants interposed a prior judgment as a plea in bar, and an appeal from such judgment as plea in abatement. A demurrer to the plea in bar was sustained and overruled as to the plea in abatement. Both parties appealed.

Murray & Farr, G. L. Johnson, Hayes & Schuyler, L. Keck, A. L. Bartholomew, and D. A. Wynkoop, for the appellant.

W. C. Gregory, L. A. Ellis, J. R. Lane, B. F. Thomas, F. D. Kelsey, and W. A. Rogers, for the appellees.

700 LADD, J. The plea in bar was good. The vital issue in *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407, as in this suit, was whether the plaintiff in this case might inherit as the sole heir of Mott Watson, deceased. That involved an interest in land; this, the title to the personal property. The parties in each action are identical. The same evidence would be required. In *Goodenow v. Litchfield*, 59 Iowa, 228, 9 N. W. 107, 13 N. W. 86, it was said, quoting from 2 *Smith's Leading Cases*, 789: "An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is announced, but in every other where the right or title is the same, although the cause of action may be different." The very right to recover is based on precisely the same ground in both actions. It is not essential that the causes of action be the same. The right or title on which they rest must be: *Aurora City v. West*, 7 Wall. 82; *Whitaker v. Johnson Co.*, 12 Iowa, 596; *Newby v. Caldwell*, 54 Iowa, 102, 6 N. W. 154; *State v. Waterman*, 87 Iowa, 260, 54 N. W. 359. See *Thomas v. McDonald*, 102 Iowa, 564, 71 N. W. 572, and authorities cited. True, that action had been appealed to this court. Our statute expressly provides that "no proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal," unless a supersedeas bond is filed, and that "no appeal or stay shall vacate or affect such judgment or order": Code, sec. 4128. The judgment remains in full force for all purposes, subject only to determination on appeal, until which time process thereon may be suspended: *Lindsay v. Clayton District Court*, 75 Iowa, 512, 39 N. W. 817; *Cole v. Edwards*, 104 Iowa, 373, 73 N. W. 863; *Hackett v. Freeman*, 103 Iowa, 296, 72 N. W. 528. Because of this statute we are precluded from adopting the rule which obtains in many ⁷⁰¹ states, holding that an appeal suspends the effect of a judgment as an estoppel: See *De Camp v. Miller*, 44 N. J.

L. 617; *Atkins v. Wyman*, 45 Me. 399; *Day v. De Jonge*, 66 Mich. 550, 33 N. W. 527; *Haynes v. Ordway*, 52 N. H. 284; *Small v. Haskins*, 26 Vt. 209; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, and note, 33 Pac. 757; *Byrne v. Prather*, 14 La. Ann. 663. The very evident purpose of this statute is to preserve to the prevailing litigant the fruits of his judgment, even though an appeal has been taken. Independent of statutory enactment, this rule obtains in England, and has the approval of courts of high repute in this country: *Creighton v. Keith*, 50 Neb. 810, 70 N. W. 407; *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 412; *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, 18 N. E. 123; *Moore v. Williams*, 132 Ill. 589, 22 Am. St. Rep. 563, 24 N. E. 619; *Faber v. Hovey*, 117 Mass. 108, 19 Am. Rep. 398; *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. 1092. See *Vinsant v. Vinsant*, 49 Iowa, 641; *Freeman on Executions*, sec. 328. The word "judgment" is used in its generic sense in the chapter relating to procedure in the supreme court, and includes decrees in equitable actions: *Lindsay v. Clayton District Court*, 75 Iowa, 512, 39 N. W. 817. It has sometimes been held that in such actions, because triable anew and subject to final disposition, the first decree should not be pleadable in bar: See *Curtiss v. Beardsley*, 15 Conn. 518; *Cain v. Williams*, 16 Nev. 426. But the distinction, if well founded, between judgments from which appeals are triable de novo, and on errors assigned, is not made by the statute quoted. Besides, the right to render final judgment is not limited to equity causes. "The court may reverse, modify, or affirm the judgment, decree, or order appealed from, or render such as the inferior court should have done": Code, sec. 4139. Section 4128 of the code leaves no option, save to hold that a judgment or decree is *res adjudicata* until set aside, modified, or reversed. That this may involve hardship occasionally must be conceded, but under ⁷⁰² a contrary holding the defeated party might avoid the force of the decision for an indefinite period by merely taking an appeal.

2. The fact that the action depends upon the same right or title will not suffice to sustain a plea in abatement. It must involve the same cause of action: *C. & S. W. R. R. Co. v. Heard*, 44 Iowa, 358; *Osborn v. Cloud*, 23 Iowa, 108, 92 Am. Dec. 413; *Jones v. Brandt*, 59 Iowa, 343, 10 N. W. 854, 13 N. W. 310; *Aetna Iron Works v. Firmenich Mfg. Co.*, 90 Iowa, 390, 57 N. W. 904; *Mathews v. Hennepin Co. Sav. Bank*, 44 Minn. 442, 46 N. W. 913; 1 Am. & Eng. Ency. of Law, 761, and cases

collected; note to *Smith v. Lathrop*, 84 Am. Dec. 448. The cause of action in the suit for partition of the land was not the same as that demanding the personal property. The latter could not have been joined with the former (Code, sec. 4240), and was necessarily prosecuted in a separate suit.

3. The action for partition involved the very right to all the property left by the deceased, and the situation of the parties was such as to warrant a continuance of other suits involving the same right or title until that was determined: *Standard Imp. Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366; *Succession of Troxler*, 46 La. Ann. 738, 15 South. 153. On both appeals, reversed.

Waterman, J., takes no part.

RES JUDICATA.—THE ESSENTIAL ELEMENTS of *res judicata* are the identity of the parties and of the issue involved. And the issue will be deemed the same whenever, in both actions, it is supported by substantially the same evidence; *Morrison v. Clark*, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1034.

RES JUDICATA—RIGHT OF APPEAL.—While the party against whom a judgment has been rendered retains the right of appeal therefrom, it cannot be admitted in evidence against him as a bar: *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757. But see *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; note to *Naftzger v. Gregg*, 37 Am. St. Rep. 29-32.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

BARTH v. BARTH.

[102 Ky. 56, 42 S. W. 1116.]

A MARRIAGE IS VOID where either party to it has a living, undivorced husband or wife.

EQUITY—JURISDICTION—MARRIAGES.—Courts of general equity jurisdiction have express statutory authority, in the state of Kentucky, to declare void a marriage obtained by force or fraud.

MARRIAGE—ACTION FOR DIVORCE—FRAUD—ANNULMENT OF MARRIAGE.—Pending an action for a divorce brought by a husband against his alleged wife, the plaintiff should be permitted to file an amended petition, alleging that, at the time of the marriage between the plaintiff and the defendant, the latter represented herself to be an unmarried woman, when in fact she then had a living, undivorced husband; and such petition may properly contain a prayer that the marriage be declared void ab initio.

ABATEMENT—REVIVOR OF SUIT TO ANNUL MARRIAGE.—A man who is a party to a void marriage has a right to petition a court to have his marriage declared null and void and to relieve his estate from any further claim of his alleged wife, and this right survives to his administrator, who is entitled to have the decedent's property rights determined.

REVIVOR OF SUIT TO ANNUL MARRIAGE—INJUNCTION.—If a plaintiff in an action for divorce dies, after having filed an amended petition to annul the marriage, and his administrator and heirs file an amended petition of revivor, in which they seek to have the action prosecuted in the name of the administrator, but a demurrer thereto is sustained, the plaintiffs should be permitted to file a second amended and supplemental petition for the annulment of the marriage, alleging that the defendant is asserting certain property rights in the estate of the decedent, as his widow, and asking that she be enjoined from setting up or making any claim whatever to such estate.

MARRIAGE—ACTION FOR DIVORCE—COSTS—ATTORNEY'S FEE.—In a suit for divorce, brought by a husband, the wife is in fault and not entitled to an attorney's fee or any other costs where she had a husband living at the time of the alleged marriage with the plaintiff.

Barnett, Miller & Barnett, for the appellants.

Kohn, Baird & Spindle and Kinney, Gregory & Kinney, for the appellees.

58 BURNAM, J. In June, 1894, George F. Barth filed his petition against appellee for divorce, a vinculo, on the ground of habitual drunkenness. Appellee filed answer, denying the allegations of the petition, and made it a counterclaim against plaintiff, and asking for a divorce and alimony, on the ground of cruel and inhuman treatment. On motion of the defendant the court ordered plaintiff to pay to the defendant's counsel, for her, the sum of eight dollars every week during the pendency of the suit as alimony and maintenance, and further ordered the plaintiff to turn over and deliver to defendant certain personal property, consisting largely of furniture, which was then in the possession of plaintiff, but which had been jointly used by the parties while they lived together as man and wife; the order further providing, however, that none of this property was to be sold or disposed of by defendant, but was to be held by her subject to the further orders of the court in the final determination of the suit.

59 In April, 1895, plaintiff filed an amended petition, in which he alleged that at the time of his marriage to the defendant she had represented herself to be an unmarried woman; that her first husband was dead; that he had been killed in a railroad accident, and that he so believed; but that he had just learned that at the time of his marriage to the defendant she had a husband, to whom she had been previously married, living, and that he was alive and undivorced at that date, and prayed the court to declare his marriage with the defendant null and void ab initio, and for proper and equitable relief, and he immediately proceeded to take depositions, which, if unexplained, conclusively establish the facts alleged in the amended petition.

Subsection 3, section 2097, of the Kentucky Statutes expressly declares that a marriage where there is a husband or wife from whom a person marrying has not been divorced is void. Section 2100 of the Kentucky Statutes provides: "Courts having general equity jurisdiction may declare void a marriage obtained by force or fraud." There can be no doubt that the amended petition set up a good cause of action and that the court had, by express authority, power to grant the relief sought. The defendant never filed answer to this amended petition.

In May, 1895, the plaintiff died, and William E. Barth, his brother, having taken out letters of administration upon his estate, filed an amended petition, seeking to have the action to declare the marriage null and void revived and prosecuted in his name as administrator of deceased plaintiff, and in this amended petition the heirs at law of the decedent, who are his mother, brothers, and sisters, united.

⁶⁰ Defendant filed a general demurrer to this amended petition of revivor, which was sustained by the lower court, upon the ground that when plaintiff died the action abated and could not be revived or prosecuted by his personal representatives and heirs at law; that if any property rights of the personal representative or heirs at law of the deceased plaintiff should be threatened by defendant based upon her marriage with the deceased plaintiff, she could be restrained by direct proceeding in equity, and for the further reason that their supplemental amended petition did not aver any fact showing that the defendant claimed any right, based upon her marriage with the deceased plaintiff, and referred the case to the commissioner to fix an attorney's fee for the defendant's attorney, to be paid out of the decedent's estate.

Appellants thereupon tendered and offered to file a second amended and supplemental petition, in which they allege that, in addition to the facts stated in their former amended petition, "defendant now claims and asserts that she was the lawful wife of George F. Barth at the time of his death, and she claims that she is his widow, and that as such widow she is entitled to dower and distributable share in the estate of George F. Barth; that she claims all the property rights aforesaid against the estate; that she has in her possession, and claims to own, as widow of deceased, the household furniture which belonged to the deceased at his death, and which had been turned over to her for her use pendente lite in obedience to the order of the court in July, 1894; that she refused to surrender the property to either of the plaintiffs, though it had been demanded of her," and asking that she be required to return to the ⁶¹ plaintiff, as administrator, this personal property, and that she be enjoined from setting up or making any claim whatever to the property belonging to the estate of George F. Barth at the time of his death, and for all proper and equitable relief.

The court refused to permit this supplemental petition to be filed, and confirmed, against the exceptions and objections of appellants, the commissioner's report fixing the fees of ap-

pellee's attorney at three hundred dollars, and dismissed the petition of plaintiffs. From that judgment this appeal is prosecuted.

If the state of facts set up in the amended petitions of revivor is true, no judgment of divorce was necessary, as the marriage was void from the beginning; but these amended petitions show that the marriage, the validity of which is called in question, was celebrated according to the forms of law, and was, therefore, *prima facie* a valid marriage, and the burden was upon decedent or his administrator to establish the facts alleged in order to relieve the estate of decedent from the claims of defendant arising out of and belonging to her as widow, and courts have always been open to the petition of a litigant to have such *prima facie* marriage declared void and to grant relief when the facts authorized it. There can be no question that deceased in his lifetime, upon discovering this additional ground of relief and defense against the counterclaim of defendant, had the right to petition the court, if the facts were true, to declare the marriage null and void and to relieve him and his estate from any further claim of the defendant, and for a restoration of the property which had been taken out of his possession ⁶² by the court on the motion for maintenance and alimony, upon the theory that a valid marriage existed between the parties; and as the deceased had the right to set up these additional facts, it follows necessarily that this right survived to his administrator.

Section 501 of the Civil Code provides: "An order of revivor may be made on the motion of any party to the action, or of his representative or successor, suggesting the death or cessation of power, which, with the name and capacity of the representative or successor, shall be stated in the order. Or any party to the action, or his representative, may file in the action a petition against the other parties, stating facts necessary to authorize a revivor and prayer therefor, upon which summons may be issued and served or warning order be made under like restrictions and with like effect as if issued or made upon an original petition." The action which appellants sought to revive was to demand a restoration of the property which had been taken out of the possession of his decedent against his protest and delivered to the defendant, and also to have determined the validity of defendant's claim as widow to any portion of the estate of deceased.

It cannot be contended that the amended petitions of revivor which the administrator and heirs sought to file was a departure from the relief sought by the amended petition filed by the decedent in his lifetime. The administrator and heirs had the right to have these important property rights determined, and this right of the administrator and heirs is in nowise dependent upon any action taken by decedent in his lifetime, as it is very properly said in the opinion of the ⁶³ chancellor "this was a void, and not a voidable, marriage," and it did not require any election by decedent in his lifetime to authorize them to seek the relief demanded.

There is no reason why these questions cannot be litigated and determined in this suit. The parties are all before the court; the case has been partially prepared; the action now involves solely the determination of the property rights of the parties. Appellee has in her possession property of appellants which she holds under an order of the court, and it was the duty of the chancellor to pass upon the appellants' claim to have this personal property restored to them.

Whilst this court cannot review questions of divorce, yet we have the right to review the case for other errors by which appellants may have been prejudiced.

Section 900 of the Kentucky Statutes provides: "In actions for alimony and divorce the husband shall pay the costs for each party, unless it shall be made to appear in the action that the wife is in fault and has ample estate to pay same." And this court has frequently held that these costs include a reasonable attorney's fee; but this statute applies to suits between husband and wife, and if, as alleged in this case, defendant had a husband living at the time of her marriage with decedent and the marriage with decedent was void ab initio, it is evident that she was in fault and not entitled to attorney's fee or any other costs.

We think the chancellor erred to the prejudice of appellants in sustaining the demurrer to the amended petition of revivor and in overruling their motion to file their supplemental amended petition, and for these reasons the judgment is reversed and the cause remanded for proceedings consistent herewith.

BIGAMOUS MARRIAGES—VALIDITY OF.—A marriage is void, and no decree is required to avoid it, if either of the contracting parties has a husband or wife then living and undivorced: See the monographic note to *State v. Lowell*, 79 Am. St. Rep. 378, showing

what marriages are void and discussing, at page 371, the validity of marriages procured by fraud, and the power of courts with respect thereto.

ABATEMENT—SURVIVAL OF ACTIONS—SUIT FOR DIVORCE—TORTS.—A suit for divorce abates by the death of either of the parties pending the suit: Note to *Kimball v. Kimball*, 82 Am. Dec. 197. That a cause of action founded wholly on a private wrong does not survive, see *Payne's Appeal*, 65 Conn. 397, 48 Am. St. Rep. 215, 32 Atl. 948.

GLAZAR v. HUBBARD.

[102 Ky. 68, 42 S. W. 1114.]

FALSE IMPRISONMENT — LIABILITY OF POLICE JUDGE.—If a person is arrested by a city marshal simply on the strength of a telegram from another state, a police judge has no jurisdiction or authority to commit him to jail, where there is no charge against him or warrant of any kind, and if he does so commit him without hearing any evidence of his guilt, he is answerable therefor in an action of false imprisonment, although he may not have been actuated by improper or corrupt motives.

FUGITIVES FROM JUSTICE — NECESSITY OF WARRANT.—The arrest and confinement in jail and delivery over to the proper authority of a person guilty of a felony anywhere in the United States, if found in this state, is authorized only when a warrant has been issued by judicial authority upon affidavit of the facts. He cannot be committed to jail by any judicial officer before whom he may be brought until satisfied, upon hearing evidence, of his guilt.

Hewlitt & Hodge, for the appellant.

John C. Gates, for the appellee.

⁶⁹ **LEWIS, C. J.** Appellant brought this action for false imprisonment, stating in his petition, substantially, appellee maliciously, wrongfully, and without any authority of law issued a mittimus, directed to and commanding the jailer of Caldwell county to receive appellant into the jail, and keep him safely until discharged by due course of law, and that in virtue of said wrongful order he was put into said jail and there kept until released on a writ of habeas corpus, issued by the judge of Caldwell county court.

Appellee in his answer, after denying he either maliciously, with intent to injure appellant, wrongfully, or without authority of law issued the order of commitment, stated that he was at the time police judge of the city of Princeton, and the

order in question was made by him in discharge of his duty as such judge, as he believed it to be. As additional defense he stated that one J. T. Coleman, city attorney, advised him it was proper to commit appellant to jail, and being himself ignorant of the law, relied upon and acted according to his advice; that, therefore, appellee is entitled to judgment over against Coleman for any sum plaintiff in the action may recover against him, and to that end his answer was made a cross-petition.

Coleman filed a demurrer to that part of the answer, as did also appellant, and of course both were properly sustained, for it constituted no defense to the action nor cause of cross-action against Coleman, though the latter acted out of the line of his duty and apparently in ignorance of ⁷⁰ the relative rights and duties of appellant as a citizen and of appellee as a judicial officer.

As appears from the evidence, the only authority the marshal of the city of Princeton had for arresting and bringing appellant in custody before appellee as police judge was the following telegram, purporting to be from E. F. Gibson, chief of police of Opelika, Alabama:

"September 18, 1894.

"To Chief of Police, Princeton, Ky.

"Arrest Ben Glazar, and wire me."

And appellant was committed to jail by order of appellee, acting as police judge, with no other warrant than that telegram, and without any evidence whatever showing or tending to show him guilty of offense against the law of either Alabama or Kentucky. Yet the lower court instructed the jury trying the case in substance that appellant was entitled to no reparation unless appellee, in depriving him of his liberty, acted without honest conviction of duty and with corrupt and improper motives. And as there was no evidence showing appellee acted corruptly or with bad motive, of course the verdict had to be and was for him.

As early as the case of *Gregory v. Brown*, 4 Bibb. 28, 7 Am. Dec. 731, decided in 1815, this court held that when a magistrate acts judicially upon a subject within his jurisdiction, though he should act illegally or erroneously, he cannot be made liable for any damages sustained by his conduct, unless he acted from impure or corrupt motives. And the rule has been extended and applied in the case of even an officer of election who may be required to act judicially in determining the qualification of

a person offering to vote. But in all the cases it has been distinctly made a condition of immunity ⁷¹ of judicial officers from damage for wrong and injury done by his decision or act, that such decision be rendered or act done within his jurisdiction of the subject matter or of the person affected. As said in *Cooley on Torts*, 416: "Every judicial officer, whether the grade be high or low, must take care before acting to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and for all purposes. When he acts, he must be clothed with jurisdiction, and acting without this, he is but the individual assuming an authority he does not possess." Further, on page 420, he says: "The rule of law which compels him to keep within his jurisdiction at his peril cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so."

In this case the marshal had no warrant of any kind to arrest appellant. It was too plain for a person having any knowledge of the duties of the office of police judge that appellee, as such, had no jurisdiction whatever of the person of appellant, or authority to inquire in regard to the matter, much less to commit him to jail without any legal charge against him or evidence in support of a charge.

Kentucky Statutes, section 1930, authorizes arrest and confinement in jail, and delivery over to the proper authority of a person guilty of a felony anywhere in the United States, if found in this state, only when a warrant has been issued by judicial authority upon affidavit of the facts. But he cannot be committed to jail by any judicial officer before whom he may be brought until satisfied upon hearing evidence of his guilt.

⁷² In this case no warrant was issued at all, nor was it at the time appellant was committed to jail, or subsequently, made to appear he was guilty of a felony. As, therefore, appellee acted without legal power and consequently without jurisdiction, he is liable to appellant, though the motives actuating him may not have been improper or corrupt, and it was error for the lower court to so instruct the jury.

The judgment is reversed and cause remanded for a new trial consistent with this opinion.

FALSE IMPRISONMENT.—THE JUDGES OF COURTS OF LIMITED JURISDICTION are liable in an action for false imprisonment for acts done without jurisdiction. Thus, a justice of the peace committing a person illegally arrested is liable if he has no

jurisdiction over him: See the monographic note to Tryon v. Pingree, 67 Am. St. Rep. 423, on false imprisonment.

FUGITIVES FROM JUSTICE—ARREST AND DETENTION UPON TELEGRAMS.—The arrest and detention of a person in one state upon the authority of telegrams received from the authorities of another state, reciting that they have a warrant for his arrest, a copy of which is given, together with the statement that they have started after him with proper papers, is unauthorized: *Simmons v. Vandyke*, 138 Ind. 380, 46 Am. St. Rep. 411, 37 N. E. 973; but compare the monographic note to this case discussing the arrest and detention of fugitives from justice before demand made.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. JARBOE.

[102 Ky. 80, 42 S. W. 1097.]

INSURANCE—LIFE—PAID-UP POLICY IN PROPORTION TO PREMIUMS.—A person whose life has been insured is entitled to a judgment for a nonparticipating paid-up policy, where the original policy distinctly provides that the insured shall be entitled to such a paid-up policy, in proportion to the premiums paid, after having made three annual payments, if he surrenders the original policy before default, or within six months after default in the payment of premiums, although he fails to surrender the original policy within six months after default, and to demand the issuing of the other within that time.

Grubbs & Morancy, Edward Lyman Short, and Frederick L. Allen, for the appellant.

81 GUFFY, J. This suit was instituted in the Marion circuit court by the appellees against the appellant seeking to obtain judgment for a paid-up insurance policy. It appears from the petition that a three thousand dollar policy of life insurance was issued by appellant on the life of said Benjamin F. Jarboe, payable to his wife, appellee herein. Said policy was issued on what is known as the twenty-year distribution plan, and on **82** which said Jarboe was to pay only twenty annual payments. The annual premiums amounted to ninety-three dollars and thirty cents each. It is alleged that appellee paid the three first annual payments, the last of which was made January 2, 1891. It is alleged in the petition that plaintiff was unable to pay the premium falling due January 2, 1892. It is also alleged in the petition that after the payment of three annual payments appellees were entitled to a paid-up policy for the sum of four hundred and fifty dollars, and that before the filing

of this suit the appellees demanded of Will R. Ruble, acting agent of appellant, a paid-up policy for the said sum. Appellees averred that they were ready to deliver and surrender to appellant the policy aforesaid, and all their right, claim, and interest in same on the issuing and delivering to appellees a paid-up policy for the sum of four hundred and fifty dollars, and that appellant and its agents failed and refused to issue to appellees any paid-up policy, and failed and refused to deliver same or to issue any paid-up policy on their making the demand as above stated. It is alleged that said policy should be made payable to Hattie Jarboe at the death of said Benjamin F. Jarboe.

It is also claimed in the petition that there should be added to the sum of four hundred and fifty dollars dividends thereon. The insurance policy was made part of the petition. One of the provisions reads as follows: "After three full annual payments have been paid upon this policy the company will, upon the legal surrender thereof before default in payment of any premiums, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as hereinafter provided, for the proportion of the amount of this policy which number of full years' premium paid bears to the total number required."

⁸³ Appellant demurred to the petition, which demurrer was overruled by the court; thereupon appellant filed its answer, which may be taken as a traverse of all the material averments of the petition, except the fact of the issual of the policy as claimed and the payment of three payments. Appellees' demurrer to the answer was sustained by the court, and appellant failing to plead further, judgment was rendered directing the appellant to issue and deliver to plaintiffs a nonparticipating paid-up policy for the sum of four hundred and fifty dollars on the life of plaintiff, Benjamin F. Jarboe, payable at the death of said Benjamin F. Jarboe to his wife, Hattie Jarboe, etc., and from that judgment this appeal is prosecuted.

The contention of appellant is that inasmuch as the policy issued by it to the appellees was not surrendered before default in the payment of premium had occurred, or within six months thereafter, that the right to the paid-up policy was forfeited, or the obligation of appellant to issue a paid-up policy had terminated, and cites *Hexter v. United States Life Ins. Co.*, 91 Ky. 357, 15 S. W. 863, and *Northwestern Mutual Life*

Ins. Co. v. Barbour, 92 Ky. 429, 17 S. W. 796, in support of its contention.

It will be seen from an examination of the first-named case that the policy was issued in 1867, and that nearly fifteen years thereafter, the assured in the meantime having died, suit was brought to recover upon the policy; hence the facts in the case at bar are essentially different from the case supra.

In the case in 92 Ky. 429, 17 S. W. 796, it will be seen that several notes were executed by the assured for the payment of premiums and default made as to the payment of the notes; ⁸⁴ that no money was ever paid upon the policy, either as premiums or interest on the notes given for the premiums after December 3, 1884, and when default was made December 8, 1886, there was indebtedness for premiums of the prior date and of interest about one hundred dollars, and within about three years thereafter the action was brought to recover. That case is unlike the case at bar.

The case of *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush, 51, is a well-considered case, and in which, it seems to us, the question involved is practically the same involved in the case under consideration. The appellee in that case had issued a policy of insurance to Montgomery on his life in the sum of ten thousand dollars, payable in ten annual payments. Among other conditions the following condition was embraced in the policy: "It being understood and agreed that if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the nonpayment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years shall have been made it will issue a policy for two-tenths of the sum originally insured; if for three years, for three-tenths, and in the same proportion for any number of payments without subjecting the assured to any subsequent charge except the interest annually in advance on all premium notes remaining unpaid on this policy."

It seems after making five payments assured made default ⁸⁵ and failed to surrender the policy or to demand a new one within the time prescribed in the policy. The beneficiary in the policy, Mrs. Montgomery, brought suit to recover five-tenths of the amount insured. The court below dismissed her petition

and she prosecuted an appeal to this court. The court in discussing the question said: "Three questions are presented for decision, which may be stated thus: 1. Did the failure to surrender, or to offer to surrender, the policy within twelve months after the default in the payment of premiums release the company from any further liability on the policy, or any part of the sum insured? 2. Was the policy forfeited by the failure to pay the note for \$129.40 when due? 3. If the foregoing questions be answered in the negative, how much is the appellant entitled to recover?"

The court further said: "Prior to September 5, 1872, the insured had paid for four full annual premiums, and on that day had a right to demand a paid-up policy for four thousand dollars, not *ex gratia*, as appellee's counsel seems to intimate, but because it had been paid for. Each annual premium paid for carrying the policy for the current year and for one thousand dollars of paid-up insurance, and at the end of four years a paid-up policy was as certainly paid for, at the contract price, as the four years of current insurance.

"If, as we assume for the present, the premium for the year commencing September 5, 1872, was not paid, the stipulation is that the company shall not be liable for the payment of the whole sum assured, but only for a part thereof ⁸⁶ proportionate to the annual payments made as above specified, and this policy shall cease and determine."

We quote further from the case *supra*: "Time is not generally of the essence of contracts: Story's Equity Jurisprudence, sec. 776. It may be so when the contract is executory on both sides, or when the nature of the transaction or the stipulation of the parties shows it was so intended by them. But when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity. If for any reason the defendant has become unable to perform his agreement, or performance would be more difficult or onerous at the time of the demand than it would have been at the time stipulated, there might be plausibility in such a defense, and a court of equity would no doubt either deny all relief to the plaintiff or grant relief upon terms that would compensate the defendant for the additional burden resulting from the plaintiff's delay. But nothing of the kind is pretended in this case.

The proposition upon which this branch of the company's defense rests is this, and nothing more. It is admitted that the assured paid for a paid-up policy for four thousand dollars, and if the old policy had been surrendered at any time between September 5, 1872, and September 5, 1873, the company would have been bound to issue a new policy for that sum, and because the old policy was not surrendered within that time that the assured has lost the benefit of four thousand dollars of paid-up insurance."

⁸⁷ It will be seen from the policy in the case at bar that it was distinctly provided that if the assured paid three annual payments he was then entitled to a paid-up policy in proportion to the premiums paid, provided he surrendered the policy before he made default, or within six months after default in the payment of premiums. It is clear under the contract that the three payments not only continued the policy in force for the time being, but also paid, at the election of the assured, for a paid-up policy in proportion to the premiums paid. The contract has none of the elements of an offer to sell, but it is a clear case in which the assured has bought and paid for a certain thing. It has a stipulation in effect that he shall demand it within six months after his abandonment of the other benefits acquired under the same contract. The only defense presented in this case is the simple fact that the appellees had not within six months after the failure to pay the premium due, surrendered the original policy and demanded the issuing of the other. It is not pretended that it was any more difficult or expensive for the appellant to issue a paid-up policy when demanded than if it had been demanded at the end of the six months, nor can it be of any pecuniary consequence to defendant whether the forfeited policy was delivered up before the institution of this suit. The original policy, being dead and of no effect, could be of no value to any person.

It seems clear to us that under the principles announced in *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush, 51, that the appellees were entitled to recover in this action, and we adhere to the doctrine announced in that decision. To the extent, if any, that the principles announced in the decisions ⁸⁸ of *Northwestern Mutual Life Ins. Co. v. Barbour*, 92 Ky. 429, 17 S. W. 796, and *Hexter v. United States Life Ins. Co.*, 91 Ky. 357, 15 S. W. 863, conflict with the doctrine announced in *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush, 51, they are overruled: *Johnson v. Southern etc. Ins. Co.*,

79 Ky. 403; Southern Mut. Life Ins. Co. v. Montague, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443.

For the reasons indicated the judgment is affirmed.

INSURANCE — LIFE — DEMAND FOR PAID-UP POLICY — CONDITION PRECEDENT—WAIVER—SURRENDER OF ORIGINAL POLICY.—If a policy of life insurance requires a demand to be made for a paid-up policy within six months after default in the payment of premium, such demand with a surrender of his policy is a condition precedent to the holder's right to a paid-up policy, and it cannot be waived by the company so as to affect the rights of the insured: *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519. If a policy of life insurance provides that, after two full annual premiums are paid, if the policy is surrendered within thirty days after default as to subsequent payments, the company will issue to the assured a paid-up policy for an amount proportionate to the number of years paid, a failure to surrender the old policy within the time limited will not forfeit the right to a paid-up policy, whether the policy be an endowment policy or an ordinary life policy: *Southern Mut. Life Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443. *Contra*, *Universal Life Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322; and see *Smith v. National Life Ins. Co.*, 103 Pa. St. 177, 49 Am. Rep. 121.

HETTERMAN v. POWERS.

[102 Ky. 133, 43 S. W. 180.]

LABOR UNIONS—TRADE LAW RULES—SUBJECTS OF. The law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork, and brain and muscle may be the subjects of trade law rules as well as tangible property.

LABOR UNIONS — DISTINGUISHING MARK OF SKILLED WORK—RIGHT TO USE.—Employés of a labor union, engaged in a skillful employment, such as the making of cigars, may so designate the result of their labor as to entitle them to the fruits of their skill when it is admittedly a source of pecuniary profit to them, although they may not own the property itself.

LABOR UNIONS — DISTINGUISHING MARK OF SKILLED WORK—PROPERTY RIGHT IN.—An employé of a labor union, whose skilled labor creates a demand for a commodity which secures for him higher remunerative wages, has a definite property right in the exclusive use of a particular label, sign, symbol, brand, or device adopted by him to distinguish and characterize his work as the product of skilled labor, and the courts will protect him against its unauthorized use.

LABOR UNIONS—LABEL DISTINGUISHING WORK AS SKILLED—LEGAL PROTECTION OF.—Members of a voluntary, unincorporated labor organization, such as a cigar makers' union, composed solely of practical cigar makers, are entitled to adopt a label as a distinguishing brand or mark of their work, and the

courts will protect them against its unauthorized use, although they do not own the cigars to which their label is attached, and are not, in the ordinary sense, "in business" for themselves, but simply workmen.

LABOR UNIONS—LABEL DISTINGUISHING WORK AS SKILLED—VALIDITY OF.—A label adopted by a cigar makers' union certifying that the cigars to which it is affixed have been made by a first-class workman, a member of the union, "an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," does not attack any other manufacturer of cigars, and does not violate the rule that a lawful trademark must not transgress the rules of morality and public policy.

Humphrey & Davie, for the appellants.

A. E. Willson and Burton Vance, for the appellees.

135 HAZELRIGG, J. The appellants were manufacturers and dealers in cigars in Louisville, Kentucky, and without right or claim of right used on boxes of cigars manufactured and sold by them the blue label of the Cigar Makers' International Union of America, a fac-simile of which is as follows:



136 Thereupon appellees, Powers, Kieffer, and Wopprice, suing for themselves and all their associates and fellow-members in the Cigar Makers' International Union and the Cigar Makers' Protective Union No. 32, and joining these two organizations also as plaintiffs, brought this action to prevent this alleged wrongful use of the label.

The International Union, embracing, according to the petition, some — members and the local union some — members, are voluntary, unincorporated labor organizations, composed solely of practical cigar makers. They are workingmen who do not own the product of their labor, being exclusively wage-workers. The purpose of these unions, as said in the petition, is generally to maintain a high standard of workmanship and secure fair wages to cigar makers, to elevate the material, moral, and intellectual welfare of the membership, and by legitimate, organized effort to secure laws prohibiting labor by children under fourteen years of age, the abolition of the "truck" system, the tenement-house cigar manufacture, and the manu-

facture of cigars by prison convict labor. Other praiseworthy objects are set out which need not be detailed. It is further averred that, for the purpose of designating the cigars made by the members of the union ¹³⁷ the label in controversy was adopted and extensively used as a trademark or certificate of identification. And, when pasted on the outside of cigar boxes containing cigars made by members of the union, it is a guaranty that the cigars are made by first-class workmen, members of the Cigar Makers' Union, etc.; that because the members receive fair wages and were thus able to furnish good workmanship, the cigars so labeled commanded a higher price than did similarly looking cigars not so labeled; that the label was, therefore, a source of great profit and benefit to the appellees and other members of the union.

The appellants, for defense, do not deny the use of the label as charged in the petition, but it is insisted by them that this label does not possess any of the elements of a trademark; that the appellees are engaged in no trade, having nothing to sell, and, therefore, nothing to protect by a trademark; that none of them are engaged in the business of selling cigars; they are "simply workmen employed by other people making cigars, first by one person and then another, and those persons sell the cigars"; that the plaintiffs, therefore, "have not shown any property right in the label as a trademark or otherwise." Moreover, that the membership is an ever-changing one, constantly varying in numbers, composed of a few thousand to-day and many thousand to-morrow—"a shifting crowd." That the plaintiffs, therefore, are not qualified to sue, and have in fact no legal rights that can be made the subject of a suit.

Moreover, it is urged that the plaintiffs do not come into court with clean hands; that they are members of an organization lately engaged in boycotting the defendants and attempting ¹³⁸ to ruin their business; that the label itself cannot be approved, either in law or morals, as it denounces other cigars than union-made ones as inferior and unwholesome, and the product of filthy tenement-houses or made by coolies and convicts.

And, first, we may admit that the label is not used as a trademark in the ordinary sense of that word. It is not a brand put on the goods of the owner to separate or distinguish them from the goods of others, but we cannot agree on that account that it does not represent a valuable right which may be the subject of legal protection. Why may not those engaged in skillful employment so designate the result of their labor as to entitle them

to the fruits of their skill when it is admittedly a source of pecuniary profit to them? And this, though they may not own the property itself?

They are not, it is true, "in business" for themselves in the ordinary sense, but they have property rights nevertheless. They may not select a label and be protected in its use apart from its connection with some commodity; but they not only select it in this instance, they apply it to property, and it does not at all matter that the tangible property is that of another.

In order to get the benefit of the superior reputation of cigars made by them, the appellees select and apply this label as a distinguishing brand or mark. And it would be strange if this thing of value, this certificate of good workmanship, and which makes the goods made by them sell and thus increases demand for their work, be entitled to no protection, because those making the selection and application ¹³⁹ are not business men, engaged in selling cigars of their own. The man who is employed for wages is as much a business man as his employer in that larger sense in which the word "business" has come to be used by statesmen and legislators.

In a number of the states laws have been enacted giving protection to the men engaged in the business of working for wages, and their right of organizing and selecting appropriate symbols to designate the results of their handiwork is recognized and ordained to be the subject of lawful protection by the courts. Thus in this state, in April, 1890, a law was enacted by the general assembly providing that "every union or association of working men or women adopting a label, mark, name, brand, or device, intended to designate the product of the labor of the members of such union, shall file duplicate copies of such label in the office of the secretary of state, who shall then give them a certificate of the filing thereof, and that every such union may, by suit in any of the courts of the state, proceed to enjoin the manufacture, use, display, etc., of counterfeits or imitations of such labels, etc., on goods bearing the same, and that the court having jurisdiction of the parties shall grant an injunction restraining such wrongful manufacture, use, etc., of such label," etc.

This suit was filed before the adoption of this statute, but it indicates the policy of the law, the growth or expansion and perhaps the creation of legal remedies hardly known to ancient trademark law.

The learned chancellor below, in an exhaustive opinion reviewing all the authorities, among other things, said, and we ¹⁴⁰ can say it no more clearly, that "the known reputation of a particular kind of skilled labor employed in the development of a particular product or class of products determines to a large degree the value or price of such products when put on the markets. To stamp or label a commodity as the product of a particular kind or class of skilled labor determines the demand for and the price of such product or commodity. The marketable price of a commodity influences the scale of wages paid for its manufacture. The higher the price, the higher the wages paid; hence it is indisputable that the employé whose skilled labor, in the production of a particular commodity, creates a demand for the same that secures for him higher remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trademark on his goods."

The question has engaged the attention of a number of the courts of this country, but the conclusions reached have not been uniform.

In *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, it was held that an injunction against the wrongful use of the label of the International Cigar Makers' Union should not be granted because of special injury to plaintiffs, who were officers and members of the union, but were not manufacturers of or dealers in the cigars on which such label is used, and to the same effect are the cases of *Cigar Makers' Protective Union v. Conhaim*, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. 943; *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625, 22 Atl. 912. However, a number of the ¹⁴¹ courts have held otherwise. In the case of *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197 (affirmed in 108 N. Y. 611, 15 N. E. 730) it was argued, as it is here, that the members of the union were not the owners or manufacturers of cigars, but merely laborers, and that, therefore, the label did not come within the settled definition of a trademark. The court said: "It is needless to discuss this phase of the case, for the right to the exclusive use of this label may be sustained, although it failed to be a trademark in the precise definition of the term as heretofore used. For whether we call the property right, which I believe plaintiffs have in the label, a trademark or by another name is a matter of slight import. It is a right

entitled to the protection of a court of equity, on the same principle as that upon which the courts have based the right to protect trademarks and goodwill. It has been accepted as the rule that the court proceeds upon the ground that a person has a valuable interest in the goodwill of his trade or business, and that, having appropriated to himself a particular label or sign or trademark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, ... he is entitled to protection against any other person who attempts to pirate on the goodwill of his friends or customers by sailing under his flag, without his authority or his consent."

In *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. 60, the court upheld the constitutionality of the trades union act in that state, and as the court, independent of the statute, disposed of one of the contentions of counsel in the case, which is also relied on here, we quote in part its argument: "It is next objected that the label, an imitation and counterfeit of which is alleged ¹⁴² to have been unlawfully used by plaintiff in error, could not have been rightfully adopted either as a trademark or form of advertisement; it is said that it transgresses the rules of morality and public policy. We are referred to the rule in respect to trademarks that 'to be a lawful trademark the emblem must avoid transgressing the rules of morality and public policy': *Browne on Trademarks*, sec. 602. . . . By reference to the label heretofore set out it will be seen that it is a certificate, signed by the president of the Cigar Makers' International Union of America, certifying that the cigars contained in the box upon which it was placed were 'made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison or filthy tenement-house workmanship.' And it concludes: 'Therefore we recommend these cigars to all smokers throughout the world.' The purpose, as derived from the label itself, is to send the cigars out to the public with the assurance that they are made by a first-class workman, who belongs to an order opposed to the inferior workmanship designated. It will be observed that the label attacks no other manufacturer of cigars. It says simply, in effect, these cigars are not the product of an inferior, rat shop, coolie, prison or filthy tenement-house workmanship. Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may

he not procure the certificate of others as to the quality of the article he puts upon the market": *State v. Hagen*, 6 Ind. App. 169, 33 N. E. 223; *Carson v. Ury*, 39 Fed. 777.

¹⁴³ Further, we agree with the learned chancellor that there is no competent evidence that the appellees, or any of them, have been engaged in boycotting the appellants, and thus deprived themselves of the right to enforce their legal remedies in a court of equity. Whatever may be said of the letters and circulars looking to this end, and exhibited in the proof, it is not shown by any competent proof that the appellees instigated or had aught to do with the attempted boycott. And, moreover, this boycott, which seems to have occurred in 1886, did not in any way grow out of the wrongful use of the label in controversy. On the whole case, therefore, we are of opinion that the law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork, and that brain and muscle may be the subjects of trade law rules as well as tangible property.

The judgment is affirmed.

LABOR UNIONS—LABELS—RIGHT TO PROTECTION IN USE OF.—The label of the Cigar Makers' International Union is not technically a trademark, but an unauthorized use of it may be restrained by injunctive proceedings: *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569, 31 S. W. 9. A person is entitled to be protected in the use of a particular label or wrapper as much as in the use of a trademark: *Mercalf v. Brand*, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. 773. Workmen's union label acts are constitutional: *Schmalz v. Wooley*, 57 N. J. Eq. 303, 73 Am. St. Rep. 637, 41 Atl. 939; *Perkins v. Heert*, 158 N. Y. 306, 70 Am. St. Rep. 483, 53 N. E. 18.

LABOR UNIONS—LAWFUL LABEL—WHAT IS.—A cigar label reading like that in the principal case is not unlawful as transgressing the rules of morality and public policy, and may be legally adopted: *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. 60.

MAYSVILLE v. WOOD.

[102 Ky. 263, 43 S. W. 403.]

MUNICIPAL CORPORATIONS CANNOT HOLD LAND IN TRUST FOR RELIGIOUS PURPOSES. Hence, there can be no dedication to a municipal corporation, as trustee, for such purposes.

DEDICATION FOR RELIGIOUS PURPOSES—EVIDENCE OF.—If land in a city has been dedicated to the public, and the plat, which is the only evidence of the dedication, divides the land into three squares, called, respectively, "Public Square," "Seminary Square," and "Meeting-house Square," the dedication of the latter will be held to be for religious purposes only.

W. H. Wadsworth and J. N. Kehoe, for the appellant.

E. L. Worthington and G. S. Judd, for the appellees.

264 WHITE, J. This action was begun in the circuit court of Mason county by the appellant, the city of Maysville, against the appellees, George T. Wood and others, by which the appellant sought to adjudge a sale by the court's commissioner, made under an ex parte proceeding on behalf of appellees, Wood and others, declared void and a nullity, and to enjoin said appellees from in any way interfering with a certain lot of ground in the said city of Maysville, and also sought to perpetuate said ground for the purposes for which same had been dedicated years before. The petition states that in the year 1818 one **265** Samuel January owned the land in that part of the city of Maysville, and laid same off into streets and alleys and lots, and sold lots according to said plat and had same recorded; the place was then called Limestone, but was not an incorporated town. On this plat there is a lot of ground, the land here in contest, marked "Meeting-house Square." This ground was never sold and has never been built upon. Some time after the year 1818 the said town of Limestone was incorporated as East Maysville, and in 1853 the trustees of said town of East Maysville, by a regular deed of conveyance, executed and acknowledged, deeded, or undertook to convey to Shackelford, Anderson, and Spencer, as trustees for the Christian or Reformed Baptist Church and to their successors in office, this said ground, known as "Meeting-house Square," providing that said trustees shall take possession of same and inclose and improve same in conformity to the true spirit and intention of the original donor. The said deed reciting that as the said Samuel January and his wife and eight out of their nine children were, or had been,

members of the Christian or Reformed Baptist Church, that his charity (this lot) should be occupied by the church of which he and family were members. This deed was duly recorded in the clerk's office of Mason county.

The petition also alleges that afterward the said town of East Maysville became a part of the city of Maysville, and was such part at the filing of said petition. The petition states that at the September term, 1891, the appellees, Wood, Williams, and Hall, acting as trustees of the religious denomination known as the Maysville Christian Church, by an ex parte proceeding, sought and obtained a decree of the circuit ²⁶⁶ court of Mason county, directing a sale of this lot, known as "Meeting-house Square," and that under said decree the same was sold and was bought by appellees, Kackley and Traxel; that on the day of sale the said purchasers were notified of the fact that this appellant objected to the sale and would contest the title of the purchaser, and that on the report of sale being filed in said ex parte proceeding this appellant appeared and offered to file exceptions to the confirmation of the sale, but the court refused to permit same to be filed, and that appellant now brings this suit and asks that said sale be declared void, and that said lot of land be declared a dedication from said Samuel January to the use of the public to be used for the sole and only purpose of erecting thereon a house or houses of religious worship, which the petition alleges was the object and intention of said donor. The circuit court sustained a demurrer to this petition and appellant by leave amended, and in the amendment the only change made is that it is alleged that said lot of land was by said Samuel January dedicated to the public for use as a place of public resort or meetings of any and all legal character, and that the appellant had expended large sums of money on the streets adjacent to said property, in grading and beautifying same.

To this amendment and the petition as amended the court sustained a demurrer, and appellant declining to plead further the petition was dismissed, and from that action of the court this appeal is prosecuted. The sole question to be determined on this appeal is, Did the petition of appellant, or the same as amended, present a cause of action in appellant? If that question be determined in the affirmative the judgment of the circuit court should be reversed.

²⁶⁷ In the amended petition filed the only change made from the original is the allegation that the city of Maysville had improved the streets around this "Meeting-house Square," and the

allegation that in the dedication made by Samuel January, the said donor intended "that said dedication was made for public meeting purposes generally, and intended as a place of public resort, where the public generally had a right to and could meet and transact any and all matters affecting the public generally." This amendment only states the conclusion of the pleader as to the intention of the donor, as he therein pleads the dedication by the express words of the plat and makes same a part thereof. It seems to us that this conclusion is not warranted by the plat, which is the only evidence of the dedication. On this plat there are three squares set apart, called, respectively, "Public Square," "Seminary Square," and "Meeting-house Square." The two latter are situated adjacent, with an alley only between. The public square was some squares away, and it seems to us that the only meaning that could be attached to the words "Meeting-house Square" are those given to same in the original petition, i. e., for religious purposes and with a view of making it a place of religious instruction and worship.

Now, with this being the true meaning and intention of the donor in making the dedication, can the appellant, the city of Maysville, maintain this action? The question is not whether a lot may be dedicated for a church lot or for religious purposes, for that is now well settled that it can, but whether a lot dedicated for religious or church purposes can be under the control of the municipal government, or whether ²⁶⁸ the municipality can hold the title as trustee for the public so as to maintain an action for its perversion.

In Dillon on Municipal Corporations, section 573, the principle is stated thus: "Municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands in trust for any object or matter foreign to the purpose for which they are created, and in which they have no interest."

To this principle we assent, and hold that municipal corporations cannot hold land in trust for religious purposes. It is clear that since the establishment of this government it has always been the intention of its citizens to entirely separate church and state. In all our constitutions such an intention is clearly expressed, and in the light of this history it is manifest that at no time was any municipal corporation ever organized in this state with any power or authority in matters affecting religious worship.

We have said that land may be dedicated for church or religious purposes, but in no event can this dedication be to a

municipal corporation as trustee. The duty of the corporation in regard to church property or religious worship is to guarantee the citizen his property or religious rights and the free enjoyment of same.

As the appellant, the city of Maysville, has no right of property in the lot in question, all of which appears from the petition, we are of opinion that the court did not err in sustaining the demurrers and in dismissing the action, and the same is affirmed.

MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS as are conferred upon them by their charters: *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118.

HALL v. LOUISVILLE & NASHVILLE RAILROAD CO.

[102 Ky. 480, 43 S. W. 698.]

JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—COLLATERAL ATTACK.—The proceedings of a county court in matters of probate and administration are not conclusive as to the jurisdiction of the court, because such jurisdiction may be collaterally called in question where the proper averments are made.

JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—WANT OF.—When a plaintiff, as administrator, brings an action for damages for the negligent killing of his intestate in another state, and the petition itself affirmatively shows facts which would deprive a county court of jurisdiction to grant administration, the question of want of jurisdiction in the county court may be raised by special demurrer to the petition; otherwise, the question should be raised by plea to the jurisdiction and the demurrer be overruled.

JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—NONRESIDENT NEGLIGENTLY KILLED IN ANOTHER STATE.—A county court of Kentucky is not authorized to appoint an administrator of a nonresident, negligently killed in another state, for the sole purpose of bringing an action in Kentucky upon a cause of action created by the statutes of such foreign state, although the statutes of Kentucky show legislation of a kindred nature.

B. F. Proctor and O'Neal & Pryor, for the appellant.

Lyttleton Cooke, for the appellee.

⁴⁸¹ **DuRELLE, J.** Suit was brought by appellant, as administrator of James Hall, for damages for the negligent killing of

its intestate in Sumner county, Tennessee, the petition being based upon a statute of that state giving a right of action for such killing, as well as for the pain and suffering endured before the intestate's death. A special demurrer to the petition as amended was sustained, the ground for the demurrer being stated to be because it appeared from the petition that the court had no jurisdiction, the petition showing affirmatively that plaintiff's intestate at the time of his death, and previous thereto, resided in Tennessee; that he died in Tennessee; that the negligence by which he lost his life occurred in Tennessee; ⁴⁸² that the cause of action was given by a Tennessee statute, and no similar cause of action is given by any Kentucky statute; and, furthermore, that it appeared from the petition that the defendant was operating its railroad in Tennessee, and that the intestate left no assets in Kentucky to be administered. The second ground stated for the special demurrer is that it appeared from the petition that the intestate left a widow, and the statute giving the cause of action gave the right of action therefor to the widow, and that it did not appear that she had ever waived her right of action, or consented that the appellant should qualify as administrator, and that the Jefferson county court had no power to appoint an administrator, as the intestate left no assets in Kentucky to be administered.

The first question presented is whether the judgment of the county court is conclusive in this proceeding as to its jurisdiction to appoint the administrator, or whether its action on that behalf can be collaterally attacked in the manner in which it has been attempted in this case.

In *Jacobs v. Louisville etc. R. R. Co.*, 10 Bush, 271, it was held that "the proceedings of the county court in matters of probate and administration are not conclusive as to the jurisdiction of the court, because such jurisdiction may be collaterally called in question where the proper averments are made; but in such cases the onus is upon the party raising the issue to show that want of jurisdiction."

We are of opinion that, where the pleading itself affirmatively shows facts which would deprive the county court of jurisdiction to grant administration, the question of want of jurisdiction in the county court might be raised by special ⁴⁸³ demurrer, as has been done in this case. For if want of jurisdiction to appoint the administrator may be averred and proved by the defense, it necessarily follows that if the petition itself affirmatively shows such want of jurisdiction, the question may be

raised by special demurrer, pointing out the averments which take from the defense the burden of proving the lack of jurisdiction. This court has never, so far as we are informed, held that a county court had power to grant letters of administration upon a mere right of action given by such a statute as the one under consideration, where the decedent was not a resident of the state, left no assets to be administered in this state, or the injury had not been inflicted in this state.

In *Bruce v. Cincinnati R. R. Co.*, 83 Ky. 174, the intestate was, at the time of his death, a resident of this state, and it was there held that his administrator appointed in the county of his residence could bring an action in this state upon a cause of action given by the statute of Tennessee, in which state he had been killed by the negligence of the defendant company, the operation of that statute not being by its terms or by fair construction restricted to that state. That case was followed by *Wintuska v. Louisville etc. R. R. Co.*, 14 Ky. Law Rep. 579, 20 S. W. 819. In each of those cases the county court had undoubted jurisdiction to appoint the administrator, as the decedent had been a resident of the county in which administration was granted: Ky. Stats., secs. 3894, 4849.

So in *Brown v. Louisville etc. R. R. Co.*, 17 Ky. Law Rep. 145, 30 S. W. 639, it was held that, though the decedent had been a nonresident of this state, but had been killed in the state, ⁴⁸⁴ the statute which gave the right of action to the administrator necessarily implied a right to have an administrator appointed by the local courts for that purpose alone, though there might be no other necessity or right of authority for such an appointment, and Judge Grace, delivering the opinion, said: "We deem the court of the county where the injury was done, and where the man died, the proper court to entertain such jurisdiction."

In the case of *Louisville etc. R. R. Co. v. Shivell*, 13 Ky. Law Rep. 902, 18 S. W. 944, no such question appears to have been made, and we must assume that the administratrix in that case was appointed in the county of her intestate's residence.

In the syllabus in the case of *Illinois Cent. R. R. Co. v. McDonald*, 13 Ky. Law Rep. 781, nothing whatever appears to show that the decedent was a nonresident of this state. On the contrary, the presumption is, that as the syllabus recites that the administrator appointed in this state was the proper person to bring the suit, the administrator was properly appointed in the

county of the intestate's residence, or in the county in which his estate was.

Nor do we consider it material that the defendant (appellee), being a citizen of Kentucky, could have removed this suit, if brought by a Tennessee administrator in a Tennessee court, to the federal court. But while it has been settled that the representative of a resident of Kentucky negligently killed in another state may bring suit in Kentucky under the statute of the foreign state, and that a representative of a nonresident of Kentucky negligently killed in Kentucky may be appointed in the county in which the injury occurred, under authority of the necessary implication of the ⁴⁸⁵ statute giving the right of action, in our opinion the doctrine has been extended as far as it should be, and we do not believe that it was intended to authorize the appointment in any county of this state, through which a railroad might run, of an administrator of a nonresident negligently killed in another state, for the sole purpose of bringing suit upon a cause of action created by the statute of such foreign state, although our statutes show legislation of a kindred nature.

It remains, therefore, to inquire whether the petition affirmatively shows that the Jefferson county court had no jurisdiction. It does show that appellant's intestate was, at the time of his death, a resident of Tennessee; that the negligence and the injury occurred in Tennessee, and that the cause of action sued upon was given by a statute of that state; but we are unable to find in either the petition or the amendments any averment that appellant's intestate had no estate in Jefferson county, or that there were no debts or demands owing to him there. This being so, we cannot assume, upon a demurrer to the jurisdiction, that the county court had no jurisdiction to make the appointment. On the contrary, we must assume, in the absence of averment and proof to the contrary, that facts were made to appear to the county court authorizing the appointment to be made. The question should have been made by plea to the jurisdiction and not by demurrer. We are of opinion, therefore, that the demurrer to the jurisdiction should have been overruled, and the appellee required to plead.

For the reasons stated the judgment is reversed and the cause remanded, with directions to overrule the demurrer to the jurisdiction, and for further proceedings consistent with this opinion.

JURISDICTION TO GRANT LETTERS OF ADMINISTRATION on the estate of a nonresident does not exist in the courts of Kentucky, unless he had assets there at the time of his decease: *Fletcher v. Sanders*, 7 Dana, 345, 32 Am. Dec. 96. A probate judge has no jurisdiction to grant administration upon the estate of a person whose domicile at the time of his decease was not within the county in which he was judge; and a want of jurisdiction appearing in the same record, which shows a grant of administration is conclusive against the validity of such grant: *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642.

ACTION IN ONE STATE FOR NEGLIGENCE CAUSING DEATH IN ANOTHER.—An administrator appointed and suing in Kentucky cannot maintain an action for the death of his intestate by negligence in Indiana, such action being maintainable under the Indiana statute, but not under that of Kentucky: *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244; same principle: *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144, 20 Am. St. Rep. 461, 19 Atl. 643. Compare *Higgins v. Central etc. R. R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *Oates v. Union Pac. Ry. Co.*, 104 Mo. 514, 24 Am. St. Rep. 348, 16 S. W. 487. An action for wrongful act causing death in another state is discussed in the note to *Attrill v. Huntington*, 14 Am. St. Rep. 353; and see the monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 869-885, showing when transitory causes of action may not be prosecuted in a foreign state or country.

BALL v. MAYSVILLE & BIG SANDY RAILROAD CO.

[102 Ky. 486, 43 S. W. 731.]

EMINENT DOMAIN—TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE—DAMAGING IS A TAKING.—If a railroad is so constructed that it unreasonably obstructs ingress and egress to and from a street, and its prudent operation causes smoke, soot, and cinders to be thrown in and upon the property of abutting owners, the injury thus resulting is a taking of private property for a public use, for which compensation must be made.

EMINENT DOMAIN—DAMAGE TO PROPERTY BY RAILROAD COMPANY—LIEN OF OWNER UPON ROAD.—If a railroad company takes private property for a public use by so constructing its road in a street as to injure the property of an abutting owner, the latter has a lien upon the entire road in the nature of a vendor's lien to secure payment of the damages thus resulting to him. Such lien must exist on the entire road, for the reason that there cannot be a sale of only that part of it which fronts on the property without serious injury to the owners of the road and the rights of the public.

EMINENT DOMAIN—LIEN OF JUDGMENT CREDITORS FOR DAMAGES—PRIORITY OF.—The lien of creditors, who have obtained judgments for damages for injuries caused by a railroad's taking of private property, on a public street, for a public use, is superior to the claims of all others except those of a similar nature. It is, therefore, superior to any rights of a purchaser or lessee of the road.

INJUNCTION AGAINST LESSEE OF RAILROAD.—If property abutting on a street is injured by the construction of a railroad therein, and the owner has obtained a judgment for damages therefor, he may, after a return of no property found, institute an equitable action in which one claiming subordinate rights in the road may be enjoined from using it, and in which a receiver for the company's road and property may be appointed.

JUDGMENT—RIGHT TO ENFORCE IN EQUITY—WAIVER OF.—Owners of abutting property, who have been injured by the construction of a railroad in a street, and who have obtained judgments for damages therefor against the railroad company, do not lose their right to enforce the judgments in equity, or waive their liens, because they did not, at the time of obtaining their judgments, also obtain personal judgments, as they might have done, against another railroad company claiming a subordinate right in the road.

RECEIVERS FOR RAILROADS — APPOINTMENT OF — INSUFFICIENT EQUIPMENT.—A court should not refuse to appoint a receiver for the road and property of a railroad company, at the instance of a judgment creditor, for the reason that the road is not sufficiently equipped to enable a receiver to properly operate it.

E. L. Worthington, Garrett S. Wall, and L. W. Robertson,
for the appellants.

Wadsworth & Cochran, for the appellees.

487 PAYNTER, J. As judgment creditors of the Maysville & Big Sandy Railroad Company, on returns of no property found, the appellants instituted this, an equitable action against the Maysville & Big Sandy Railroad Company, by which it is sought to have the road placed in the hands of a receiver, and also relief by injunction. The judgments were rendered for damages resulting respectively to the abutting properties—real estate of the appellants situated in the cities of Maysville and Dover, Mason county, Kentucky—by the construction and prudent operation of the railroad on the streets upon which the property abuts.

The manner in which the railroad was constructed unreasonably obstructed ingress and egress to and from the street, and the prudent operation of it caused smoke, soot, and cinders to be thrown in and upon their property. It is hardly necessary to add that the constitution of the state only allows private property to be taken when for public use, and then only when just compensation is previously made. It is no longer an open question in this state that the damages resulting to property in the manner indicated is a taking of private property for a public use, and for which compensation must be made.

In *Stickley v. Chesapeake etc. R. R. Co.*, 93 Ky. 327, 20 S. W. 261, the court said: "When the proximity of the road to the dwelling is such as to prevent the reasonable ingress and egress to and from the premises, to cause necessarily soot and cinders to enter the dwelling, then it becomes a taking of private property for public use, and for which compensation must be made."

If thus damaging the property is a taking in the meaning ⁴⁸⁸ of the constitution, then there should be a remedy commensurate with the injury resulting from the invasion of private rights. If the person so injured simply has a legal claim for such injury, the railroad company may be wholly insolvent, and a recovery of a personal judgment will not in any degree enable the party to be compensated for the property taken. The taking implies that there has been an appropriation or deprivation of something. Should the owner be compelled to surrender such property right without retaining a claim upon it for compensation, it can be taken against his will, when done by constructing the road along the street on which his property abuts, without any security that he will ever be compensated for it. As he cannot tell until the road is constructed the extent of his damages, he cannot by an injunction prevent its construction: *Fulton v. Short Route R. R. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. 332.

Will it do to hold that he cannot prevent the invasion of his rights before the road is constructed along the street, then when it is done say that he has no right greater than that afforded him by a personal judgment, maybe against an insolvent corporation?

It seems that a court of chancery, when the taking of the property is accomplished, as was done in this and similar cases, will not protect the owner by restraining the appropriation of the property because the extent of the injury cannot be ascertained until the railroad is constructed. Now, when the injury has been ascertained, can a court of chancery afford to say that, notwithstanding it was not proper to prevent the invasion of private rights, still there is no equitable right which will enable the owner to pursue that ⁴⁸⁹ which was taken from him, and claim a lien upon it to the extent of the injury. It would seem that courts of equity would be established for little purpose if they are powerless, in the first instance, to prevent the invasion of private rights, and, in the second, to give an adequate remedy for the injury it could not prevent.

We are of the opinion that the appellants have a lien in the nature of a vendor's lien on the Maysville & Big Sandy railroad for their judgments. From the character of the property, the lien must necessarily exist on the entire line of railroad, as there cannot be a sale of only that part of the railroad which fronts on the property without serious injury to the owners of the road and the rights of the public for whose use the private right must, for just compensation, yield. If there could be a sale of such sections of the road as are in front of the properties injured, then it would necessarily follow that there could be a severance, and possession taken of such parts thus sold by the purchaser.

It appears that the Chesapeake & Ohio Railroad Company is in possession of the Maysville & Big Sandy road under some sort of arrangement, the nature of which is unknown to the appellants. Whatever may be the nature of the contract between the companies, the Chesapeake & Ohio Railroad Company cannot acquire any rights which will interfere with the rights of the appellants to enforce the collection of their judgments. The liens of the appellants are superior to the claims of all others, except they be of a similar nature. If it were otherwise, then the Maysville & Big Sandy Railroad Company could lease or sell its line of road and defeat the collection of the claims of those whose property had been taken in the construction ⁴⁹⁰ and maintenance of the road. The purchaser or lessee takes the road with the burdens on it.

It was said in *Stickley v. Chesapeake etc. R. R. Co.*, 93 Ky. 327, 20 S. W. 261, "that a railroad company which enters upon and appropriates the land of another to its own use, without right, cannot transfer its corporate privileges to another so as to justify a continuance of the wrong in its vendee as if the latter were an innocent purchaser."

In *Pennsylvania Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138, the court said: "It is not in the power of the railroad, by alienation or otherwise, to defeat this constitutional guaranty, and the alienee, purchaser, or successor will be required to take notice of the provisions restricting the power to take or damage private property for public use, and be held to take subject to the burden cast upon the railroad by, through, or under which the interest is acquired. It by no means follows, as seems to have been supposed in some of the cases, that a right of action would exist against the new company, who might, as successor to the original railroad company, become possessed of the franchise and property; but when a mortgagee or

successor company insists upon a continuation of the use, or where there is an appropriation of that part of the railroad whereby the damage has been occasioned, the right of the lot owner to compensation out of the rest is absolute."

Lewis on Eminent Domain, section 621, says: "The owner's claim for just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation. Different courts work out this result in different ways, but we believe all concur in reaching it in ⁴⁹¹ one way or another. Some courts hold that the claim for compensation is in the nature of a vendor's lien, and as such is prior to any right which the party condemning can acquire or transfer. Others hold that no title passes until payment, and, consequently, that a mortgage or conveyance by the party condemning conveys nothing to the grantee except such possessory rights as the former may have."

Section 814 of Kentucky Statutes (Act 1890) provides that: "After an execution on a judgment against any company owning or operating any railroad in this state shall be returned by the proper officer no property found, in whole or in part, the plaintiff therein may institute an equitable action against said company in the circuit court of the county in which said judgment was rendered, to place its road and property in the hands of a receiver; and the court, upon a petition showing said return and the failure to pay said judgment upon the service of summons upon said company, shall appoint some suitable person as receiver of said company, and, as such, take possession and control of all the road and property belonging to and operated by said company, including all rolling stock thereof."

It does not require argument to show that the appellants are entitled to have a receiver appointed of the property of the Maysville & Big Sandy Railroad Company under the statutes quoted. Owing to the character of the claims which have been put in judgments, the rights of the Chesapeake & Ohio Railroad Company are subordinate to them, and must yield to their superiority. If the appellants fail to realize these judgments by having the railroad placed in the hands of a receiver, then, if they do not desire to enforce their lien upon the railroad, ⁴⁹² the question may arise as to the right of the court by injunction to prevent the use of the railroad in front of their respective lands until the judgments are paid, but we do not now decide that question.

Upon the facts alleged in the petition, which on demurrer are assumed to be true, the Chesapeake & Ohio Railroad Company may be enjoined from the use of the Maysville & Big Sandy railroad, because its rights are subordinate to those of the appellants, as we have said. If the court is without authority to restrain the Chesapeake & Ohio Railroad Company from using the line of railway, then the receiver would be powerless to take possession and control of the road, and the attempt to collect the judgments through the medium of a receiver would be abortive.

It is contended that appellants might have obtained personal judgments against the Chesapeake & Ohio Railroad Company at the same time the judgments were obtained against the Maysville & Big Sandy Railroad Company for the damages sustained, and, as they failed to do so, they have lost their right to proceed in equity to enforce their judgments.

The statute we have quoted answers that contention. Besides, independent of the statute, the fact that appellants may have been entitled to maintain such action against the Chesapeake & Ohio Railroad Company did not destroy their liens, hence not their right to enforce them in such manner as the law or equitable principles authorize.

It does not appear in the petition what equipment the Maysville & Big Sandy Railroad Company owns that may be used in its operation. Counsel for appellants suggest the difficulties the receiver would have in operating the road in case ⁴⁹³ the equipment was insufficient. If such be the case, that would indicate that appellants might have trouble to collect their judgments through a receiver, but it does not prevent them from making the effort to so collect their judgments. It is also suggested that the interests of the public are in certain contingencies to be considered.

The right of the citizen to own, possess, and enjoy his property must yield to the superior right of eminent domain which is an essential attribute of sovereignty. To exercise it is an inherent power of the government. In the exercise of the right the citizen must be justly compensated for his property. If the public interests are to stand between the rights of the citizen and an effective equitable remedy to enforce that right, then it is possible to take private property for public use without compensation, and it would be disregarding the organic law of the state and destroying the property rights of the citizen.

The legislative branch of the government does not seem to think the public would suffer by placing the property of a com-

pany, owning or operating a railroad, in the hands of a receiver when it permits executions on judgments to be returned no property found. The taking of the property occurred under the constitution of 1850.

The judgment is reversed, with directions that the order sustaining the demurrer to the petition be set aside and the demurrer overruled, and for further proceedings consistent with this opinion.

EMINENT DOMAIN.—PRIVATE PROPERTY CANNOT BE DAMAGED for public use without just compensation: *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378; note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 141. Though a railroad company has legal authority to build a railroad in a street, yet, if so doing works injury to an abutting property owner, he may recover damages therefor of the company: *Guinn v. Ohio River R. R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87. Abutting owners on streets are entitled to ingress and egress to and from their property and to the light and air which the street affords. Hence, the construction of a railway, on a public street, which injuriously affects an adjacent owner by interfering with the access to, or drainage from, his property, or the exclusion of light and air therefrom is an additional servitude for which he may recover damages: Note to *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 35 Am. St. Rep. 712. In fixing damages caused by the construction of a public work, such as a bridge, the jury have a right to consider evidence of noise, dust, invasion of privacy, obstruction of light, and interference with means of access, as showing how the market value of property has been affected by the building of the bridge: *Shano v. Fifth Ave. etc. Bridge Co.*, 189 Pa. St. 245, 69 Am. St. Rep. 808, 42 Atl. 128. So, where land is taken for a railroad, the rattling of the trains, the ringing of bells, the blowing of whistles, the shaking of the ground, the filling of the air with smoke and soot, the throwing out of sparks, and the like, are matters to be considered in estimating the depreciation in value of the property as a whole: See the monographic note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 114, on damages in eminent-domain cases.

EMINENT DOMAIN — DAMAGES TO LOT ABUTTING ON RAILROAD—LIABILITY OF LESSEE.—If a railway company builds its road in a street and thus damages an abutting lot, the damage is original and permanent, and such company is at once liable therefor, but a lessee company subsequently operating the road is not liable for such damage: *Guinn v. Ohio River R. R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87.

FALKENBURG v. JOHNSON.

[102 Ky. 543, 44 S. W. 80.]

JUDGMENT—FORMER SUIT AS A BAR.—An action in which a married woman is declared to be a feme sole is not a bar to a subsequent suit by the creditors of her husband, attacking the validity of the transfer from him to her of a check for pension money, made before she was declared a feme sole, although such creditors were parties defendant in the former suit.

PENSION MONEY IS EXEMPT FROM ANY LEGAL PROCESS, the purpose of which is to subject it to the debts of the pensioner, who has a right to dispose of it in any manner he sees fit.

HUSBAND AND WIFE—TRANSFER OF PENSION CHECK FROM HIM TO HER—VALIDITY OF, AS TO CREDITORS.—A check for pension money being exempt in the hands of the pensioner, its transfer by him to his wife, as her separate estate, is not fraudulent as to his creditors, although the transferee buys a note and mortgage with the money, and the husband's creditors cannot subject the note and mortgage to the payment of his debts.

CREDITOR'S SUIT—MONEY INVESTED IN NOTE AND MORTGAGE.—If a debtor causes a certain note and mortgage, executed by another, to be assigned for the purpose of defrauding the former's creditors, and pays the obligation, in part, himself, his creditors, after obtaining a judgment at law and return of execution nulla bona, have a right, to the extent of such payment, to subject the note and mortgage to the payment of his debts.

J. F. Montgomery and J. E. Hayes, for the appellants.

N. H. W. Aaron and J. B. Stone, for the appellees.

544 GUFFY, J. It appears from the record in this case that E. S. Falkenburg was a soldier in the late war, and that in 1892 he was ⁵⁴⁵ allowed a pension for his services as a soldier, and that a check therefor, amounting to something over seventeen hundred dollars, was sent to him, and that soon afterward he transferred same to his wife, the appellant, A. A. Falkenburg, to be held by her as her separate estate, free from the control of her husband, or any husband she might have, and delivered same to her. It further appears that the Bank of Columbia held a note on F. E. Falkenburg et al., and to indemnify the sureties of F. E. Falkenburg he executed a mortgage to them upon certain lands in Russell county, balance on which note amounted to something over fourteen hundred dollars, and that appellant, A. A. Falkenburg, purchased from said bank said note, either with the check aforesaid or the money arising therefrom, which note was assigned to her to be held as her separate estate.

On the 1st of January, 1894, the appellees, John Johnson, Simco Dockery, and A. G. Hughes, instituted suit in the Rus-

sell circuit court against the appellants, in which it is alleged that the appellees had theretofore obtained separate judgments for sundry sums of money against E. S. Falkenburg, upon which executions had been returned no property found, and in this suit alleged in substance that the transfer of said pension check was without consideration and fraudulent, and made with intent to cheat, hinder, and delay plaintiffs in the collection of their claims, and claiming that the note and mortgage so purchased by the wife was, in fact, the property of the husband, and sought to have the debt adjudged to them and for the enforcement of the mortgage lien on the property described, and that same be applied to the payment of their several debts.

⁵⁴⁶ The substance of the defense is that the pension money was exempt from attachment or execution, and that E. S. Falkenburg had a legal right to dispose of it in such manner as he saw fit; that there was no intent to defraud, cheat, hinder, or delay his creditors; that he and his wife were both old and frail, and that he had one infant daughter; that his wife had for years labored and toiled for the benefit of himself and family, during a part of which time he had a number of hands hired to work; that he had received some property by his marriage, and that long before he had received the pension check he had promised his wife in the event he ever did receive it that he would give it to her; and that it was no more than a just and proper provision for her support and that of their infant daughter, and that there was a good and valuable consideration for the assignment of the same, and that he had a legal right under the laws of the United States government to make such disposition of the check as he deemed proper.

The court upon final hearing adjudged in favor of the appellees, and adjudged a sale of the mortgaged property for the payment of the debts pro rata of the said appellees, and from that judgment appellants prosecute this appeal.

It further appears from this record that F. E. Falkenburg did execute a mortgage upon a part of the same property to one Nancy Humerson for five hundred dollars or more, which note and mortgage had been assigned by her to J. B. Falkenburg. The appellees also allege that said note and mortgage had been paid off by E. S. Falkenburg, and the assignment procured to be made to J. B. Falkenburg for the purpose of cheating, hindering, and delaying the creditors of E. S. Falkenburg. ⁵⁴⁷ All of which was denied by appellants. Upon this issue the lower

court found against the appellees, and from that judgment a cross-appeal is prosecuted herein.

One of the questions involved in the original appeal is as to whether E. S. Falkenburg had a legal right to give the pension check to his wife. She was not then a feme sole, but it appears from this record that shortly afterward she was empowered to act and trade as a feme sole, and that these appellees were parties to the suit in which the power was conferred, and it seems made defense thereto. Appellants plead that suit as a bar to this action, but we are not inclined to hold that the former suit is a bar to this action.

The Revised Statutes of the United States provide that: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal process whatever while the same remains with the pension office, or any officer or agent thereof, or while same is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

It is manifest that the intention of the United States government was that the pension allowed to the pensioner should be absolutely free from attachment or any legal process by which it could be subjected to the debts of the pensioner, and that the pensioner should make any disposition of the same that he saw fit to make.

It is, however, insisted by appellees that this court has frequently decided that after the money was collected and invested in property that the property was subject to the debts of the pensioner, and that such decisions settle the right of appellees to subject the note in contest to the payment ⁵⁴⁸ of their judgments and cites in support of their contention the following cases: *Johnson v. Elkins*, 90 Ky. 164, 13 S. W. 448; *Robinson v. Walker*, 82 Ky. 604; *Hudspeth v. Harrison*, 6 Ky. Law Rep. 304; *Simms v. Walsham*, 9 Ky. Law Rep. 912, 7 S. W. 557.

It will be seen from an examination of the cases cited that they are based upon the ground that the collection of the pension money was in fact made by the pensioner or by his agent and under his direction, or that the investment or purchase of the property subjected was in fact made by him, and although the title might have been vested in others, yet it was in fact the property of the pensioner.

In the case at bar, no such facts appear; but upon the contrary the check was delivered and assigned to the wife as her absolute separate property and possession delivered to her, and that she

proceeded in her own right and name to purchase the note and mortgage in contest, and the same was assigned to her as her separate estate, and that such assignment was made in pursuance of a promise long before made to her, partly for the purpose of settlement upon her for her benefit and that of their infant daughter, and partly on account of extra services and labor performed by the wife in cooking, etc., for the hired hands of the pensioner.

As early as 1873 the legislature of this state enacted the following statute: "That the wages and compensation of married women for services and labor done and performed by them shall be free from the debts and control of their husbands, and their employers are allowed to pay such wages and compensation to such married women, and payment to them shall be a full discharge and acquittal of the employer."

⁵⁴⁹ It would seem that to the extent of the value of the labor performed by the wife that the property paid to her by the husband, even if liable to execution, could not be seized after its delivery to the wife in payment of services rendered. From the proof in this case it is evident that the delivery of the check was not intended as a fraud upon the creditors, and cannot be so held, nor can it be held to have been given without consideration.

Appellees also cite Kentucky Statutes, section 1906, etc., on the subject of gifts, assignments, etc., with the intent to hinder and delay creditors, and as to gifts, etc., without valuable consideration, which sections are the same as those in the General Statutes in force at the time of the transaction complained of.

It was held in *Cosby v. Ross*, 3 J. J. Marsh. 290, 20 Am. Dec. 140, that alienation of property not liable in law or equity to execution is not interdicted by the statute. In *Lishy v. Perry*, 6 Bush, 515, it was held that a conveyance of an exempted homestead could not be set aside as fraudulent, not even when made with intent to prefer one creditor to the exclusion of other creditors. The court in discussing the question said: "Whatever, therefore, may have been his intention in making the conveyance to Clayton, it could not be said that any legal right of appellants was violated by the conveyance of property which was exempt from liability of sale for their debt."

The same principle was again announced in *Fuqua v. Ferrell*, 80 Ky. 71. It is a well-settled rule of law in this state that a creditor cannot complain of any disposition which the debtor may make of property exempt from execution, ⁵⁵⁰ and it matters not whether such disposition be made without consideration or

with a fraudulent intent to cheat, hinder, or delay creditors, yet no right accrues to the creditor to subject such property.

It is perfectly manifest that the check in the hands of the pensioner could not have been reached by any process of law, or in any manner subjected to the payment of appellee's claim; but was at the time, by a provision of the Revised Statutes of the United States, absolutely free from the claims of appellant's creditors, and he, therefore, had a right to dispose of it in such manner as to him seemed proper.

It results from the foregoing that the court erred in rendering the judgment in favor of appellees, appealed from by the appellants; that judgment is therefore reversed, with directions to dismiss plaintiffs' petition so far as it attempts to subject the note or mortgage purchased by the appellant, A. A. Falkenburg.

As to the Humerson mortgage sought to be subjected to the payment of plaintiffs' claims, it seems to us, taking all the proof into consideration, that we are authorized to conclude that E. S. Falkenburg paid for as much as two hundred and fifty dollars of that mortgage, and to that extent it should have been subjected to the payment of plaintiffs' claims. The judgment on the cross-appeal is, therefore, reversed to that extent, and the case is remanded, with the further direction to the court below to adjudge to plaintiffs a lien on the property mentioned in the Humerson mortgage to the extent of two hundred and fifty dollars, with interest from the twenty-eighth day of July, 1891, which lien, however, will be of equal dignity only with the lien secured for the balance of said note. The appellees must pay all the ⁵⁵¹ costs in the court below, except the cost incident alone to the contest about the Humerson mortgage, and all the costs in this court.

Cause remanded for further proceedings consistent with this opinion.

PENSION MONEY—EXEMPTION OF, FROM CLAIMS OF CREDITORS.—A pensioner may use his pension money in any way he sees proper for his own benefit and to secure the comfort of his family, free from the attacks of his creditors: See the monographic note to Cullen v. Harris, 66 Am. St. Rep. 386, showing whether the proceeds of exempt personalty are also exempt from levy.

PENSION MONEY—GIFT OF, FROM HUSBAND TO WIFE—EXEMPTION.—If a pensioner gives his pension money to his wife, who buys either real or personal property with it, taking the property in her own name, such property is, in her hands, exempt from his debts. Pension money is not exempt after it has been invested by the pensioner in other property not itself exempt by statute: Note to Cullen v. Harris, 66 Am. St. Rep. 386, 387. Property purchased by a pensioner with pension money is liable to sale on execution: See the monographic note to Rozelle v. Rhodes, 2 Am. St. Rep. 596, on when money resulting from pensions becomes subject to garnishment.

BELT ELECTRIC LINE COMPANY v. ALLEN.

[102 Ky. 551, 44 S. W. 89.]

TRIAL—PHYSICAL EXAMINATION OF PLAINTIFF—REFUSAL OF, NOT ERROR, WHEN.—The plaintiff in an action for damages for permanent injuries to his person may, in the discretion of the court, be required to submit to a medical examination by experts, in cases where discovery of the truth will more likely result with than without the examination, and the ends of justice be thereby better subserved; but there is no error in refusing the defendant's request to have the plaintiff's person examined by competent physicians and surgeons selected by the defendant, where a witness and physician has already made an examination, and where a more certain ascertainment of the facts could not be elucidated by any further expert examination.

Bronston & Allen and Breckenridge & Shelby, for the appellant.

T. T. Forman, for the appellee.

552 HAZELRIGG, J. In this action for injuries received from falling through a trapdoor left open on the floor of the company's transfer office or station, the appellee recovered a judgment for fourteen hundred dollars.

Complaint is made of the instructions and the finding of the jury under the evidence for any sum and especially for the amount found. The special error complained of, however, is that the trial court refused the company's request to have the injured ankle or ankles of the plaintiff examined by competent surgeons or physicians selected by the company. Of the various errors suggested other than the last one it is only necessary to say that the evidence supports the finding, and the instructions fairly present the issues involved to the jury.

Whether the boy who left the trapdoor open was on the payrolls of the company or not, he was in charge of this door, and under the necessity of passing into **553** the cellar through it under the direct command and control of the agents and employees of the company. And even if he had been a stranger, the question whether the door had been up such a length of time before the accident as to render the place dangerous to travelers was left to the jury. Its decision was, in effect, that it was negligence on the part of the company's agents, whose constant employment was in and about the station, to invite the appellee into the office whilst it was in this unsafe condition.

The question whether a plaintiff in an action for damages for permanent injuries to his person may be required to submit to medical examination has received considerable attention in some of the states, but appears not to have arisen here. It is the contention of the company that such an examination is proper be-

cause the law requires in every case the production of the best evidence that the nature of the subject admits of, and will not be satisfied with any evidence where better evidence is withheld or concealed by a party able to produce it. That as the object of judicial inquiry is the ascertainment of the truth, the law will not allow the truth to be sacrificed by concealment of the means of its discovery.

The decisions are not entirely uniform on the subject, but we think the weight of authority is with counsel for appellant, and such physical examination may be demanded in cases where discovery of the truth will more likely result with than without the examination, and the ends of justice be thereby better subserved. The conclusions which the ⁵⁵⁴ various courts and some of the text-writers have reached are these: 1. That trial courts have the power to order surgical examination by experts of the person of the plaintiff who is seeking to recover for personal injury; 2. That the defendant has no absolute right to have an order made to that end, but that a motion therefor is addressed to the sound discretion of the court; 3. That the exercise of that discretion will be reviewed on appeal and corrected in case of abuse; 4. That the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health and without the infliction of serious pain; 5. That the refusal of the motion, when the circumstances present a reasonably clear case for examination under the rules stated, is such an abuse of the discretion lodged in the trial court as will demand a reversal of the judgment in plaintiff's favor: Alabama Southern R. R. Co. v. Hill, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90; 1 Thompson on Trials, sec. 859; 2 Wood on Railroads, ed. 1894, p. 1570; Walsh v. Sayre, 52 How. Pr. 334; Shroeder v. Chicago etc. R. R. Co., 47 Iowa, 375; Sibley v. Smith, 46 Ark. 275, 55 Am. Rep. 584; Sidekum v. Wabash R. R. Co., 93 Mo. 403, 3 Am. St. Rep. 549, 4 S. W. 701. Many other pertinent authorities might be cited, but these are deemed sufficient.

⁵⁵⁵ The petition in this case averred a permanent injury, the weakening of the plaintiff's ankle or ankles by dislocation, etc., and the case would seem to be one in which such an examination might the more fully discover the true condition of the affected part. The answer to this, as contended by the plaintiff's counsel, is that such an examination, though at first

refused, was allowed the defendant on cross-examination of Dr. Rodes, a witness for the plaintiff. It appears that this witness stated in chief that "he had seen the limb in question some time after the alleged accident; noticed some swelling and some inflammation; that it would be hard to say whether the injury was permanent or not, but that in any event the injured ankle would be more liable to a sprain again than before; that stiffness of the ankle might result, but this might be avoided by passive movement."

On cross-examination the witness said that "the only result of the original sprain existing at this time was some stiffness, which might be the result of the failure to give the ankle the proper amount of passive movement. Saw no reason why the injured ankle was not sound with the exception of some stiffness, and did not think that necessarily of a permanent nature." At this point counsel for the company asked that witness be allowed to examine plaintiff's ankle, and, upon the plaintiff consenting, counsel for both sides and the president of the company retired with the witness and physician. It may fairly be assumed that had counsel requested it their surgeons might have also attended this examination. After examination the witness, continuing his statements on cross-examination, stated that "he had ⁵⁵⁶ just examined both of plaintiff's ankles and found them alike or very nearly so, and could detect no swelling or dislocation, but discovered some stiffness in the left ankle, which might be relieved by passive movement."

The company also introduced several surgeons, who had examined the plaintiff's ankles shortly after the injury, and their testimony was to the effect that there was no permanent injury, unless perhaps a slight stiffness, so that it would seem there was no real dispute about the condition of the ankle which could likely be settled by further examination, nor does it seem to be a case where a more certain ascertainment of the facts could have been elucidated by further examination by experts.

The judgment is affirmed.

TRIAL—PHYSICAL EXAMINATION OF PARTIES—POWER OF COURT TO ORDER.—In a civil action for personal injuries, where the plaintiff tenders an issue as to his physical condition and applies for redress, the court has power to order the plaintiff to submit to a physical examination of his person, and to dismiss his action in case he refuses to submit. It is error for the trial court, in a proper case, to deny the defendant's application, reasonably made, for such an order: *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 751. This subject is discussed in the monographic note to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 242-252, discussing the physical examination of parties by order of court.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

GREENLEAF v. GERALD.

[94 Me. 91, 46 Atl. 799.]

FRAUD—FALSE REPRESENTATIONS—QUESTION OF LAW.—The question whether or not a false representation is material, no matter whether it is relied upon by a plaintiff to support an action of deceit, or by a defendant to avoid a contract, because of deceit, is one of law for the court, and not of fact for the jury.

FRAUD—FALSE REPRESENTATIONS AS GROUND FOR AVOIDING CONTRACT.—If an agent of a publisher obtains a subscription for a biographical work to be published, and falsely represents to the subscriber at the time that only three other residents of the town in which the subscriber lives will be solicited to become subscribers for such work and to have their biographies and portraits published therein, and that the portraits and sketches of only three hundred persons in all will be published therein, such misrepresentations are material and grounds for avoiding the contract of subscription induced thereby.

L. Greenleaf, for the plaintiff.

G. G. Weeks, for the defendant.

⁹⁶ WISWELL, J. The defendant signed an order and contract directed to the New England Magazine, Boston, Massachusetts, in which he requested that one copy of a work entitled "Men of Progress," consisting of one volume of portraits and biographical sketches of ⁹⁷ representative men of the state of Maine, be sent him, and in which he agreed to pay therefor the sum of thirty-five dollars, "upon issue of the part containing my sketch and portrait, and delivery of the photo-engraved plate of the portrait of myself."

In an action by the assignee under a written assignment of a claim growing out of this contract, the defendant contended that the contract was void and imposed no liability upon him, because he was induced to execute it by means of false and material representations, relied upon by him, as to the character of the work which was to be published, made by the agent of the publisher who solicited his subscription, and at the time of the execution of the contract.

The defendant introduced evidence tending to show that certain representations were made to him, before he signed the contract, relative to the number of persons in the town in which he lived who were to be solicited to have their biographical sketches and portraits published in this work, and also as to the whole number of persons whose sketches and portraits were to be published; that these representations were false, that they were relied upon by him, and that he was thereby induced to execute the contract.

The defendant's counsel requested the court to instruct the jury, in effect, that if these representations were made, and were false, and were relied upon by the defendant, who was thereby induced to make the contract, the action could not be maintained; the object of these requests evidently being to obtain an instruction that the alleged false representations were material. The presiding judge did not give the requested instructions, nor did he in his charge instruct the jury as to whether or not the alleged false representations, if made as claimed by the defendant, were material. But he submitted this question as one of fact to the jury for determination.

This was erroneous. The question whether or not a false representation, whether it is relied upon by the plaintiff to support an action for deceit, or by a defendant to avoid a contract because of deceit, is material, is one of law for the court, not of fact for the jury. This was fully settled in this state in the case of *Caswell v. Hunton*, 87 Me. 277, 32 Atl. 899.

⁹⁸ This failure, however, to instruct the jury as to the materiality of the representations relied upon by the defendant would not be prejudicial to the defendant, unless the representations were as a matter of law material, so that this question must be considered.

The contention of the defendant was, and he introduced evidence tending to prove, that the agent of the publisher, who obtained his subscription for this work, represented to him at the time that only three other residents of the town in which

the defendant lived would be solicited to become subscribers to this work and to have their biographical sketches and portraits published therein. And also that the portraits and sketches of only three hundred persons in all would be published therein.

We think that these were material representations, and that if all of the other necessary elements were proved to exist, a contract induced thereby could not be enforced. They were representations relative to the character and contents of a book that was to be subsequently published; and while ordinarily it would be no defense to a subscriber to a book to be published that it contained more than it was represented it would contain, this is not true with reference to a work of this particular character. The inducement held out to a person, in order to obtain from him such a contract as this, is not simply that the subscriber may obtain a copy of the book, but that he may have the pleasure of seeing, and of knowing that others will see, his own sketch and portrait published therein. Under these circumstances the greater the number of persons whose sketches and portraits are published, the less distinction to each. This defendant was to have his sketch published as one of the "representative men of the state of Maine." It very likely was not nearly as satisfactory to him to be included among some six hundred representative men in the state, as it would have been to have been one of only half that number. We think, therefore, that the failure to instruct the jury that these representations were material was prejudicial to the defendant as well as erroneous.

This disposes of the case and makes it unnecessary to consider the other exception.

Exceptions sustained.

FRAUD.—THE EFFECT OF FRAUD on contracts is considered in the monographic note to *Whitworth v. Thomas*, 3 Am. St. Rep. 729-745.

FRAUD IS A QUESTION OF FACT, as a rule: *National State Bank v. Vigo etc. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330, 40 N. E. 799; note to *Brown v. Mitchell*, 11 Am. St. Rep. 757, 758.

STATE v. SNOWMAN.

[94 Me. 99, 46 Atl. 815.]

CRIMINAL LAW.—AN INDICTMENT CHARGING BUT ONE OFFENSE, and closely following the language of the statute claimed to be violated, so that the offense charged and the statute under which the indictment is found can be clearly identified and understood, is neither insufficient in law nor bad for duplicity.

POLICE POWER—REGULATION OF VOCATION.—If a vocation, naturally lawful, or the mode of exercising it, inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the state, by the exercise of its police power.

CONSTITUTIONAL LAW—REGISTRATION OF AND LICENSING GUIDES.—A statute requiring a person acting as guide in inland fisheries and forest hunting to be registered and certified by the commissioners of inland fisheries and game, and to pay a reasonable fee therefor, and imposing a penalty for engaging in such vocation without first complying with the statute, is constitutional and valid, and does not deprive him from engaging in a lawful vocation.

FISH AND GAME—POWER OF STATE OVER.—The fish and wild game in a state belong to the people thereof in their sovereign capacity, and they may either permit or prohibit their taking. If the state permits the taking of fish and game, it has full authority to regulate such taking, and may impose such conditions, restrictions, and limitations as it deems needful or proper.

POLICE POWER—LICENSING VOCATION.—If the state has power to license any business or vocation, it may exact a reasonable fee for carrying it on.

CRIMINAL LAW—TRIAL—INSTRUCTIONS.—If a person is charged in an indictment with having been unlawfully engaged in the business of acting as a guide, the question whether he was so engaged is exclusively for the jury. A single act of guiding, with proof of other circumstances, may satisfy them of the truth of the charge, while proof of two or more acts of guiding, with other facts, might fail to satisfy them. Hence an instruction that if a person acts as guide one or more times, not being licensed as required by statute, he is guilty, is erroneous and ground for reversal.

E. E. Richards, county attorney, and L. T. Carleton, for the state.

E. Foster and O. H. Hersey, for the defendant.

108 FOGLER, J. The respondent was indicted and tried for an alleged violation of the provisions of section 1 of chapter 262 of the Public Laws of 1897, which reads as follows:

“Section 1. No person shall engage in the business of guiding, as the term is commonly understood, before he has caused his name, age, and residence to be recorded in a book kept for that purpose by the commissioners of inland fisheries and game, and

procured a certificate from said commissioners, setting forth in substance that he is deemed suitable to act as a guide, either for inland fishing or forest hunting, or both, as the case may be. Whoever engages in the business of guiding without having complied with the provisions of this section forfeits fifty dollars and costs of prosecution."

Section 2 of the same chapter is as follows:

"Sec. 2. Each registered guide shall, from time to time, as often as requested by the commissioners, on blanks furnished him by the commissioners, forward a statement to them of the number of persons he has guided in inland fishing and forest hunting during the time called for in said statement, the number of days he has been employed as a guide, and such other useful information relative to the inland fish and game, forest fires, and the preservation of the forests in the localities where he has guided, as the commissioners may deem of importance to the state."

Other sections of the chapter require that the registration provided for by the act shall take place annually on or before the first day of July; that when any registered guide shall be convicted ¹⁰⁹ of any violation of the inland fish and game laws he shall forfeit his certificate; that a fee of one dollar shall be paid by each person registered, and that the money thus received shall be and become a part of the fund for the preservation of inland fish and game; and that the act shall not be construed to apply to any person who has not, directly or indirectly, held himself out to the public as a guide, or solicited employment as such.

The indictment alleges that the respondent, Elmer Snowman, at Rangeley in the county of Franklin, "on the second day of July, in the year of our Lord 1898, and on divers other days between said second day of July, A. D. 1898, and the day of the finding of this indictment, was then and there engaged in the business of guiding in inland fishing and forest hunting, as the term is commonly understood, said Elmer Snowman not having caused his name, age, and residence to be recorded in a book kept for that purpose by the commissioners of inland fisheries and game of the state of Maine, and had not then and there procured from said commissioners a certificate setting forth in substance that he is deemed suitable to act as a guide either for inland fishing or forest hunting, against the peace," etc.

The jury returned a verdict of guilty, whereupon the respondent filed a motion in arrest of judgment, which was overruled

by the presiding justice, and to such overruling of the motion the respondent excepts.

The respondent also excepts to an instruction given by the presiding justice to the jury.

The motion in arrest of judgment alleges that the indictment is bad for duplicity and is otherwise insufficient in law, and that the statute under which the respondent is indicted is unconstitutional.

We are of opinion that the indictment is sufficient in law. But one offense is charged, namely, that of having been unlawfully engaged in the business of guiding, and the indictment is not, therefore, bad for duplicity. The indictment follows closely the language of the statute, so that the offense charged and the statute under which the indictment is found can be clearly identified and understood.

110 The counsel for the respondent contends that the statute under which the respondent is indicted is repugnant to that clause of the declaration of rights, section 1, article 1, of the constitution of Maine, which declares that: "All men are born equally free and independent, and have certain natural, inherent, and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

It is argued in support of this contention that the statute in question deprives the respondent and others from engaging in a lawful vocation, and is therefore in contravention of the provisions of the bill of rights, guaranteeing the liberty of all citizens.

It is unquestioned that every person has the natural right to pursue any lawful vocation, but such natural right is subject to the legal maxim, *Sic utere tuo ut alienum non laedas*. So when a vocation, naturally lawful, or the mode of exercising it, inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the state by the exercise of its police power, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state: *Dexter v. Blackden*, 93 Me. 473, 45 Atl. 525; *Tiedeman's Limitations of Police Powers*, sec. 1.

The question here is whether the enactment of the statute under consideration by the legislature was a legal and constitutional exercise of such power, or falls within constitutional limitation.

The rule to be observed by the judiciary in determining the constitutionality of a legislative enactment is thus stated in

State v. Lube, 93 Me. 418, 45 Atl. 520: "Every presumption and intendment is in favor of the constitutionality of an act of the legislature. Courts are not justified in pronouncing a legislative enactment invalid unless satisfied beyond a reasonable doubt of its repugnance to the constitution; and nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will warrant the judiciary in declaring an act of the legislature unconstitutional and void."

The manifest purpose of the statute in this case is the preservation ¹¹¹ of the fish in inland waters of the state, and the game in its forests. By the terms of the act a person, to be authorized to act as a guide in inland fisheries and forest hunting, must be registered and certified by the commissioners of inland fisheries and game, whose certificate must set forth in substance that the person to whom it is issued is suitable to act in such capacity. Each person so registered and certified is required, as requested by the commissioners, to furnish certain statistics as to his employment as guide, and also such other useful information relative to inland fish and game, forest fires, and the preservation of the forests, as the commissioners may deem important to the state.

The fish in the waters of the state and the game in its forests belong to the people of the state in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking: *Martin v. Waddell*, 16 Pet. 410; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, and cases there cited; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *State v. Redman*, 58 Minn. 393, 59 N. W. 1098.

In the case last cited the court says: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common."

In *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402, it is said: "The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."

When the state permits the taking of fish and game, it has full power and authority to regulate such taking. It may impose such conditions, restrictions, and limitations as it deems needful or ¹¹² proper. *Geer v. Connecticut*, 161 U. S. 528, 16 Sup. Ct. Rep. 604, in which Mr. Justice White, who delivered the opinion of the court, exhaustively examined and discussed the question here involved, citing an array of authorities, says: "In most of the states laws have been passed for the preservation and protection of game. We have been referred to no case where the power to so regulate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes": See, also, *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. Rep. 559; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Allen v. Wyckoff*, 48 N. J. L. 90, 57 Am. Rep. 548, 2 Atl. 659; *Phelps v. Racy*, 60 N. Y. 10, 19 Am. Rep. 140; *Moulton v. Libbéy*, 37 Me. 494, 59 Am. Dec. 57; *State v. Whitten*, 90 Me. 55, 37 Atl. 331.

It has been for many years the policy of this state to protect and preserve its fish and game, and to that end the legislature has annually appropriated and caused to be expended large sums of money, and has enacted numerous statutes. Under this wise policy the fish and game within its borders have become of great importance and value to the state. The statute here in question is a further enactment in pursuance of such policy.

It is well known that most sportsmen who frequent remote streams and lakes, and traverse the trackless forests which cover large portions of the state, do so under the guidance and direction of guides. Guides may be regarded as instrumentalities in fishing and hunting. Guides should possess such skill, experience, sagacity and probity that not only the safety of the sportsman but the welfare of the state can be properly intrusted to them. They should be under such restrictions that it shall be for their interest to discountenance violation of the fish and game laws. The legislature has deemed it wise to create such a body of men who shall pursue such vocation under the supervision of the commissioners of inland fisheries and game, and shall assist the commissioners in protecting and preserving the property of the state. The privilege of hunting and fishing is granted by the state freely and without price; and it is reasonable and proper that all who avail themselves of such privilege, whether they be fishermen, hunters, or guides, should conform and be amenable to such regulations as the state may impose. We are of opinion that the legislature has the ¹¹³ constitutional

power to regulate the employment of guides in fishing and hunting as provided in the statute here in question.

The learned counsel for the respondent further contends that, assuming the statute to be otherwise constitutional, the requirement that each person registered and certified under the provisions of the act shall pay a fee of one dollar is repugnant to the constitution, and that the statute is for that reason unconstitutional and void. We do not sustain that contention. It is well settled that when the state issues a license to any person to carry on any business or to engage in any vocation, it may exact a reasonable fee therefor: Tiedeman on Limitation of Police Powers, sec. 101, p. 274 et seq., where the authorities upon this point are collated and examined. The fee required by this statute is certainly reasonable, being no more than is sufficient to defray the expense of registering and certifying and maintaining necessary supervision.

We therefore hold that the statute under which the respondent is indicted is not repugnant to the constitution of the state, but is constitutional and valid.

The defendant excepts to the following instructions given to the jury by the presiding justice, viz.: "And I think I will say to you, for the purposes of this case, as it will undoubtedly go forward to the law court, if he acts as guide one or more times, not being licensed, he falls within the provisions of the statute as being engaged in the business of guiding. I think the statute intended to prohibit all guiding unless by licensed guides."

This instruction was erroneous and the exception thereto must be sustained.

The respondent is charged in the indictment with having been unlawfully engaged in the business of guiding. Whether he was so engaged, as a business, was a question exclusively for the jury. A single act of guiding with proof of other circumstances might satisfy them of the truth of the charge; while, on the contrary, proof of two or more acts of guiding, with other circumstances proved, might fail to so satisfy them. Moreover, the statute (Pub. Laws, c. 262, sec. 5), provides that: "This act shall not be construed to apply to any person who does not directly or indirectly ¹¹⁴ hold himself out to the public as a guide or directly or indirectly solicit employment as such."

Exceptions as to sufficiency of indictment and as to constitutionality of statute overruled. Exceptions to instructions of presiding justice sustained. New trial granted.

POLICE POWER, EXTENT OF.—The power of a state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society extends to almost everything within its borders: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 237.

LICENSE LAWS ARE SUSTAINABLE as an exercise of the police power or of the power of taxation: See the note to *People v. Naglee*, 52 Am. Dec. 331. The legislature has full power to enact license laws: *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516.

GAME.—IN THE EXERCISE OF THE POLICE POWER a state may prohibit the taking of wild game and any commerce in it: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

STATE v. MONTGOMERY.

[94 Me. 192, 47 Atl. 165.]

INTERSTATE COMMERCE—PEDDLERS—LICENSE.—If goods have been shipped into the state unsold, taken from the carrier, the packages opened, and the goods carried about from place to place in the state and offered for sale, they have become thereby a portion of the mass of the general property of the state, have ceased to be under interstate commerce protection, and become subject to the laws of the state, and their sale may be regulated by the state the same as any other property.

INTERSTATE COMMERCE—PEDDLERS—LICENSE.—A statute by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents of the state and those of other states, is not, as to peddlers of goods previously sent them by manufacturers in other states, repugnant to the grant by the federal constitution to Congress of the power to regulate commerce among the several states.

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST ALIENS.—A state statute which forbids peddling except under a license, and which provides that citizens may be thus licensed, and that aliens shall not be, is a denial of the "equal protection of the laws" as to the latter and an unconstitutional discrimination against them not sustainable as a proper exercise of the police power of the state.

E. E. Richards, county attorney, for the state.

C. Hale, A. F. Belcher, and J. C. Holman, for the defendant.

197 SAVAGE, J. This case has been once before this court upon a report of facts agreed—*State v. Montgomery*, 92 Me. 433, 43 Atl. 13—with the result that the case was ordered to "stand for trial." At the trial at *nisi prius*, the respondent was found guilty of going about from place to place in Farmington, then and there carrying for sale and exposing for sale certain picture

frames without being licensed therefor, and in violation of the Laws of 1889, chapter 298, as amended by the Laws of 1893, chapters 282 and 306. He now brings the case forward upon exceptions to certain instructions which were given, and certain ¹⁹⁸ which were refused to be given, to the jury by the presiding justice. We do not deem it necessary to consider the exceptions seriatim. The several requested instructions present the grounds upon which the respondent bases his claim that the statute in question is unconstitutional; but we shall, we think, be able to dispose of the case by a consideration of the instruction which was actually given to the jury, and which was "that the defendant was amenable to the statute of this state, the Act of 1889, chapter 298, relating to hawkers and peddlers; that he was not protected or justified by any law of this state or by the constitution of the state, or by the constitution of the United States, or by act of Congress, in performing these acts, without a license granted to him under the provisions of our own statute." This instruction raises in the broadest manner the constitutionality of the hawkers and peddlers' act. The facts relied upon by the state to support the prosecution are the same which are stated in the opinion in *State v. Montgomery*, 92 Me. 433, 43 Atl. 13. We shall not review that opinion, nor do we intend to change it. So far as concerns any point that was decided then, it stands.

Much of the argument of the learned counsel for the respondent, relating to the interstate commerce clause of the United States constitution, we think is inapplicable to the facts presented. In exceptions and in argument, they overlook the fact, as we deem it to be, that the picture frames in question, at the time of the alleged offense, had ceased in any way to be the subject of interstate commerce. They had been shipped to this state unsold. They had been taken from the carrier. The packages had been opened, and the respondent was carrying them about from place to place in this state offering them for sale. No person had agreed to buy them, or any of them, before they were shipped here. No person here was under any contract with regard to them. Another agent of the respondent's employer had secured orders for pictures, and "on securing an order," left a contract with the party giving the order, in which it was stated that "all portraits are delivered in appropriate frames" which patrons may buy or not as they desire. It does not even appear that the picture frames were in any way an ¹⁹⁹ inducement to the giving of the order. It rather appears that

the statement in the "contract" was made as an inducement to the patrons to buy, at some future time, picture frames "at greatly reduced prices." *Quod est demonstrandum.*

These considerations, we think, take this case out of the protection of the interstate commerce provision of the constitution giving to Congress the power to regulate "commerce among the states." Nor does the fact that the hawkers and peddlers' act may, under some conditions, be void as to goods which are at the time the subject of interstate commerce necessarily render it invalid as to all goods under all conditions.

A legislative act may be entirely valid as to some classes of cases and clearly void as to others: *Cooley's Constitutional Limitations*, 6th ed., 213. Judge Cooley says: "If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others": *Tiernan v. Rinker*, 102 U. S. 123; *Packet Co. v. Keokuk*, 95 U. S. 80. This is undoubtedly sound doctrine. To illustrate: If it were held otherwise, our highway damage law would have been rendered entirely inoperative by the decision in *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276, holding that a single provision in the statute which existed then was obnoxious to the clause in the fourteenth amendment, declaring that no state shall deny to persons within its jurisdiction the equal protection of the laws. Such, too, would have been the effect upon our prohibitory liquor law by the decision in *State v. Intoxicating Liquors*, 85 Me. 304, 27 Atl. 178, holding, under the laws which then existed, that intoxicating liquors in the possession of a common carrier and in transit from another state to this were "commerce among the several states," and so within the protection of the interstate commerce provision of the constitution of the United States. But no one would claim, we think, that either of these statutes was to be regarded as wholly unconstitutional because a single provision was held unconstitutional: ²⁰⁰ *Presser v. People*, 116 U. S. 252, 6 Sup. Ct. Rep. 580; *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583.

Accordingly, we hold that whatever may be the effect of the statute as to goods which are properly subject to interstate commerce protection, it is clearly constitutional, in this respect, as to goods which have completed their transit, have ceased to be objects of interstate commerce, and have become a portion of the

mass of the property in the state, as in this case. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state: *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Howe Machine Co. v. Gage*, 100 U. S. 676. When a package is broken up for use or for retail by the importer, it ceases to be under interstate commerce protection, and becomes subject to the laws of the state, and its sale may be regulated by the state like any other property: *Cooley's Constitutional Limitations*, 6th ed., 717; *License Cases*, 5 How. 589; *Brown v. Maryland*, 12 Wheat. 419; *Cook v. Pennsylvania*, 97 U. S. 566.

A statute of a state, by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents of the state and those of other states, is not, as to peddlers of goods previously sent to them by manufacturers in other states, repugnant to the grant by the constitution to Congress of the power to regulate commerce among the several states: *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367.

But the respondent goes further, and raises a question not raised at the former hearing of this case and not then considered or decided. He says that the provision in section 2 of the hawkers and peddlers' act, which provides that a license shall be granted "to any citizen of the United States," but "to no other person," is obnoxious to the fourteenth amendment to the constitution of the United States, by which it is declared that "no state shall make or enforce any law which shall abridge the privileges or ²⁰¹ immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is clear that by the provisions of the statute only citizens of the United States can be licensed to peddle. An alien cannot be licensed. A discrimination is made between citizens and aliens. Does this discrimination violate the constitutional provision which we have cited? This presents a federal question, and properly we seek an answer first in the decisions of the United States courts.

If this were a question of discrimination against "citizens of the United States," the solution would be easy. The privileges

and immunities guaranteed by the clause in the constitution, which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, are said, in *Paul v. Virginia*, 8 Wall. 168, to be the relief "from the disabilities of alienage in other states; it [the clause in question] inhibits discriminating legislation against them by other states; it gives them the right of ingress into other states and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws."

It is not in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give to its citizens essential privileges connected with that business which it denies to citizens of other states: See *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. Rep. 165.

The use of the phrase "privileges and immunities," in the constitutional provision referred to, plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging, and when there of engaging, in lawful commerce, trade, or business without molestation: *Ward v. Maryland*, 12 Wall. 418; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Slaughter House Cases*, 16 Wall. 36; *In re Watson*, 15 Fed. 511; *Sayre Borough v. Phillips*, 148 ²⁰² Pa. St. 482, 33 Am. St. Rep. 842, 24 Atl. 76; *Bliss' Petition*, 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *State v. Wiggin*, 64 N. H. 508, 15 Atl. 128.

The decisions all hold in effect, and some of them in terms, that the business of peddling, which is lawful in itself, cannot be regulated by a state so as to discriminate against citizens of the United States. We do not see how it could be held otherwise. It is a "privilege" to be enjoyed on equal footing with citizens of the state.

But, on the other hand, an alien is not a citizen. He is, however, a "person" whom the state cannot deprive of life, liberty, or property without due process of law, and to whom the state cannot deny, while he is within its jurisdiction, "the equal protection of the laws." This was settled in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. It was the case of an unnaturalized Chinaman, and it was held that the "constitutional provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences

of race, of color, or of nationality": See, also, *Fraser v. McConway & Torley Co.*, 82 Fed. 257. While an alien is not entitled to the "privileges and immunities" of a citizen, strictly as such, under the first clause of the fourteenth amendment which we have quoted, he is, while within our jurisdiction, entitled to the "equal protection of the laws."

And after all, the distinction between the practical rights of the citizen under the guaranty of "privileges and immunities" and the rights of the alien "within the jurisdiction," under the guaranty of "the equal protection of the laws" is, so far as the prosecution of the business of peddling is concerned, shadowy and unsubstantial. One has the privilege; the other the right of a protection equal to that of a citizen. This want of distinction is noticed by Swayne, J., in the *Slaughter House Cases*, 16 Wall. 36, who, after referring to the rights secured to citizens, said: "In the next category, obviously *ex industria*, to prevent as far as may be the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person,' and ²⁰³ 'life,' 'liberty,' and 'property,' and 'the equal protection of the laws.' 'The equal protection of the laws' is guaranteed to all. 'The equal protection of the laws' places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness." To be sure, these words are found in a dissenting opinion, but they were not concerning any subject of dissent, and are entitled to weight as the expression of a wise and experienced judge. In fact, as we shall hereafter see, this construction of the phrase, "equality of the laws," has been adopted with greater particularity by the supreme court of the United States. It was concerning this clause that the court, in *Strauder v. West Virginia*, 100 U. S. 303, asked: "What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, . . . that no discrimination shall be made against them because of their color?"

The language of Justices Field and Clifford in *Ex parte Virginia*, 100 U. S. 339, is that: "The reach and influence of the amendment are immense. It opens the courts of the country to everyone on the same terms, for the security of his person or property, the prevention and redress of wrongs and the enforce-

ment of contracts; it assures to everyone the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by all others. . . . It secures to all persons their civil rights upon the same terms."

Says Field, J., in *Neal v. Delaware*, 103 U. S. 370, dissenting from the proposition that practical exclusion of colored persons from the jury was a denial of that equality of protection which has been secured by the constitution and laws of the United States:

"Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them on the same condition as to others, with like rules of evidence and modes of procedure, for the security ²⁰⁴ of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness, which do not greatly affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for a violation of the laws."

Like definitions of the clause "equal protection of the laws" are found in *Pace v. Alabama*, 106 U. S. 583, 1 Sup. Ct. Rep. 637; *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207.

In *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. Rep. 18, it was declared that "many wrongs may be obnoxious to the prohibitions of the fourteenth amendment which are not in any just sense incidents or elements of slavery. Such, for example, would be . . . denying to any person or class of persons the right to pursue any peaceful vocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the fourteenth amendment. . . . The fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."

In *County of Santa Clara v. Southern Pac. R. R. Co.*, 118 U. S. 396, 6 Sup. Ct. Rep. 1132, 18 Fed. 385, it is said: "By equal protection is meant equal security to everyone in his private

rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens and charges than such as are imposed upon all others under like circumstances. This protection attends everyone everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure”: See, also, *Ho Ah Kow v. Nunan*, 5 Saw. 552, Fed. Cas. No. 6546.

So in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, it was said: “The fourteenth ²⁰⁵ amendment in declaring that no state ‘shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,’ undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.” And such is the construction which this court, following the federal court, has given to the amendment in question: *Leavitt v. Canadian Pac. Ry. Co.*, 90 Me. 153, 37 Atl. 886.

While it is held that the fourteenth amendment does not interfere with the police power of a state, it is also held that the police regulations must be impartial. The court said in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357: “Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment”: *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207; *State v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948, 54 N. W. 1104.

The specific regulations for one kind of business which may be necessary for the protection of the public can never be just

ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges upon the same conditions: *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730. ²⁰⁶ See, also, *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; *Marchand v. Pennsylvania R. R. Co.*, 153 U. S. 380, 14 Sup. Ct. Rep. 894; *Leavitt v. Canadian Pac. Ry. Co.*, 90 Me. 153, 37 Atl. 886.

The inhibition of the fourteenth amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation: *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737; *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128; *Nashville etc. Ry. Co. v. Taylor*, 86 Fed. 168.

In *In re Parrott*, 1 Fed. 481, holding unconstitutional a provision in the constitution of California which prohibited corporations from employing Chinese or Mongolians, the court said: "It appears that to deprive a man of the right to select and follow any lawful occupation . . . is to deprive him of both liberty and property within the meaning of the fourteenth amendment."

A statute of Pennsylvania imposing a tax of three cents a day upon employers of foreign born, unnaturalized male persons for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employés, was held to deprive the latter of the equal protection of the laws: *Fraser v. McConway & Torley Co.*, 82 Fed. 257. The court said: "Evidently, the act is intended to hinder the employment of foreign born, unnaturalized male persons. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others under like circumstances are not subjected."

While it is true, as a general proposition, that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorneys' fees of parties successfully suing them, and all black

men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are ²⁰⁷ distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis: *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255. See *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276.

In the light of these interpretations of the fourteenth amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the "equal protection of the laws." It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen: *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064.

Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society; but against a class solely as aliens. Such a discrimination is forbidden: *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255.

And although in this case the discrimination was not injurious to the respondent, because he was not an alien, and was not thereby prohibited from obtaining a license, still, for reasons already suggested, we think the hawkers and peddlers' act must be regarded as invalid in toto. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing.

The statute is invalid as to aliens. They may peddle without license. If we hold it is nevertheless valid as to citizens, it works a discrimination against citizens and in favor of aliens—a result which we think the legislature plainly did not intend: *Cooley's Constitutional Limitations*, 213.

Exceptions sustained.

PEDDLER'S LICENSE.—A STATUTE or ordinance authorizing the grant of a peddler's license to any citizen of the state, but prohibiting a grant of such license to any person of another state, is a trade regulation discriminating between citizens, and void as an attempted regulation of interstate commerce: *Sayre Borough v. Phillips*, 148 Pa. St. 482, 33 Am. St. Rep. 842, 24 Atl. 76. However, a nonresident peddler may be made liable to pay a license, and subject equally with citizens of the state to penalties for refusing to: *Rash v. Farley*, 91 Ky. 344, 34 Am. St. Rep. 233, 15 S. W. 862. See, too, *State v. Parsons*, 124 Mo. 436, 46 Am. St. Rep. 457, 27 S. W. 1102.

OAKMAN v. BELDEN.

[94 Me. 280, 47 Atl. 553.]

HUSBAND AND WIFE—ALIENATION OF AFFECTION BY PARENTS.—While a parent may not, with hostile, wicked, or malicious intent, break up the marital relations between his daughter and her husband, simply because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer, yet he may advise his daughter in good faith and for her good to leave her husband, if the father, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving her husband. In such case, a parent may persuade his daughter, and use all proper and reasonable arguments, but the motive and the means employed are always to be considered. It may be shown that the parent acted upon mistaken premises or upon false information, or his advice and interference may have been unfortunate, still if he acted in good faith and for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

HUSBAND AND WIFE—ALIENATION OF AFFECTION BY PARENTS.—In an action to recover for the alienation of a wife's affection, an instruction that if the separation of plaintiff's wife from him was the result of the active interference of her parents, either by threats, persuasion, or argument, then they are liable, is erroneous, as it places upon such parents a much more grievous burden than they are compelled to bear in order to justify their action.

J. Williamson, Jr., and L. A. Burleigh, for the plaintiff.

S. S. and F. E. Brown, for the defendants.

281 SAVAGE, J. Action on the case by husband for the alienation of the affections of his wife by her parents, who are the defendants. The plaintiff obtained a verdict.

The plaintiff claims that the defendants unjustifiably interfered in his domestic affairs, and with intent to break up the harmonious and affectionate relations existing between him and

his wife, wrongfully enticed, advised, and persuaded her to leave him, which she did. The defendants, on the other hand, deny that they persuaded their daughter to leave her husband, and they claim, in addition, that such was the daughter's age and condition of health, and such was the plaintiff's cruel and abusive conduct toward her, endangering her health and destroying her peace of mind, they were justified in doing all that the evidence for the plaintiff tends to show that they did, even assuming it to be true. It is admitted that the marriage was clandestine, and against the will of the defendants, and that the wife returned to their home, not later than three weeks after the marriage, and has since remained there.

The jury were instructed that if the separation of the plaintiff's wife from him "was the result of the active interference of the parents," if they "put in their oar," and if "the wife would have gone back if it had not been for their interference, either by threats, persuasions or arguments, . . . they have done him a wrong, and he is entitled to compensation for that wrong." To this instruction the defendants except, and we are now to inquire whether this instruction was correct in view of the evidence and the contentions of the parties.

Whoever wrongfully interferes in the relations of husband and wife, and entices the wife to leave the husband, is liable to him in damages. While a stranger may, without liability, harbor a wife who has left her husband, he may not persuade her to leave him, or not to return to him. Though she may have just grounds for a separation, yet she may choose to return, and a stranger has no right to intermeddle, and if he does so voluntarily, he must answer ²⁸² the consequences: *Modisett v. McPike*, 74 Mo. 636. But it is universally conceded that a parent stands on different ground. Though the wife has gone out from the parental home, and has joined her husband "for better, for worse," and though she owes to him marital allegiance, and he possesses the first and the superior right to her affection and comfort and society, it is nevertheless true that the parental relation is not ended, nor has parental affection and duty ended. A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct toward her may be such as to endanger health, and entirely destroy peace and comfort, so that she may properly leave him. In such case to whom shall she fly, if not to her parents? And from whom shall she seek advice, if not from her parents? And such advice may,

we think, be enforced by reasonable arguments. A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments, drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

This conclusion is supported by the authorities. Chancellor Kent in *Hutcheson v. Peck*, 5 Johns. 196, said: "A father's ²⁸³house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. . . . I should require, therefore, more proof to sustain the action against the father than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The *quo animo* ought then, in this case, to have been made the test of inquiry and the rule of decision."

In the well-considered opinion in *Bennett v. Smith*, 21 Barb. 439, Strong, J., for the court, said: "When the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her

society, so much so that she would be justified in abandoning him, her parents ought, and I have no doubt have the right, not only to receive her into and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. . . . And the same doctrine is applicable, in my judgment, to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives": *White v. Ross*, 47 Mich. 172, 10 N. W. 188; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417.

It was held in *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791, that "if the motive of the intervening person [a parent] was pure and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed." "Much will be forgiven the parents of a wife," the court say, "who honestly interfere in her behalf, though the interference was ²⁸⁴ wholly unnecessary, and may have been detrimental to her interest and happiness as well as that of her husband; still when the motive was, not the protection of the wife, but hatred and ill-will of the husband, it is no answer to his action that the offenders were his wife's parents": *Rabe v. Hanna*, 5 Ohio, 530; *Gerner v. Gerner*, 185 Pa. St. 233, 64 Am. St. Rep. 646, 39 Atl. 884; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784.

Some authorities seem to hold that the intent alone of the parent is decisive. In a recent Mississippi case it is said, "The question must always be, Was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice, and in his action, he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have twelve men pass upon the integrity of his intentions": *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955.

"The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband. . . . If, however, the interference is by the parents of the wife, on an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they

have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible": Cooley on Torts, 2d ed., 264.

After citing with approval the words of Chancellor Kent in *Hutcheson v. Peck*, 5 Johns. 196, Mr. Schouler says: "But this does not justify even a parent in hostile interference against the husband; and the father must give up his daughter whenever she wishes to return, unless the proper tribunal has decided otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to persuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the ²⁸⁵ material point rather than the justice of the interference": Schouler's Domestic Relations, 3d ed., sec. 41.

In the instruction complained of in the case at bar, the jury were told, in substance, that if the separation of plaintiff's wife from him was the result of the active interference of the defendants, either by threats, persuasion, or arguments, then the defendants were liable. This instruction, unqualified as it was, was erroneous, and placed upon the defendants a much more grievous burden of justification than parents in such cases ought to be compelled to bear.

It is unnecessary to consider the remaining exceptions further than to say that we perceive no error in the rulings complained of.

Exceptions sustained.

ALIENATION OF AFFECTIONS—PARENT'S ADVICE.—In case of unhappiness and disagreement between a married couple, the law recognizes the right of a parent to advise the son or daughter; and when such advice is given in good faith and results in a separation, the act does not give the injured party a right of action: *Brown v. Brown*, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; monographic note to *Fratini v. Caslina*, 44 Am. St. Rep. 851.

HATCH v. FIRST NATIONAL BANK.

[94 Me. 348, 47 Atl. 908.]

NEGOTIABLE INSTRUMENTS ARE SUCH AS RUN TO ORDER OR BEARER, payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency.

NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT payable in current funds to the order of the depositor on return of the certificate properly indorsed, with interest at three per cent per annum, if on deposit six months, are negotiable instruments.

NEGOTIABLE INSTRUMENTS.—CERTIFICATE OF DEPOSIT—"CURRENT FUNDS."—The term "current funds," when used in commercial transactions as the expression of the medium of payment, must be construed to mean current money, and a certificate of deposit payable in current funds is, in this respect, negotiable.

NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT made "payable on their return properly indorsed" create no such contingency as to payment as renders them non-negotiable.

NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT payable on demand "with interest at three per cent per annum, if on deposit six months," are not rendered non-negotiable by such interest clause.

APPELLATE PRACTICE.—EXCEPTIONS do not lie to rulings that fail to raise questions of law.

L. B. Waldron, for the plaintiff.

J. and J. W. Crosby, for the defendant.

350 SAVAGE, J. This action is brought by the plaintiff as indorsee on a certificate of deposit of the following tenor:

"The First National Bank, Dexter, Maine, Jan. 6th, 1897.

"Olive Hodge has deposited in this bank five hundred and sixty dollars payable in current funds to the order of herself on return of this certificate properly indorsed.

"Int. at 3 per cent per annum if on deposit 6 mos.

"No. 2236.

C. M. SAWYER,

"Cashier."

The defendant requested the presiding justice to rule that the action could not be maintained by the plaintiff, as indorsee, for the reason that the certificate of deposit in question was not a negotiable instrument. The presiding justice declined so to rule, and the defendant excepted.

The defendant contends that the instrument is non-negotiable for three reasons: First, because it was written payable in "cur-

rent funds"; secondly, because of the clause, "Int. at 3 per cent per annum, if on deposit 6 mos."; and lastly, because of the condition of payment expressed in the words, "on return of this certificate properly indorsed."

That a certificate of deposit, as such, is a negotiable instrument is held by almost unanimous authority: 2 Daniel on Negotiable Instruments, sec. 1702; *Miller v. Austen*, 13 How. 218; and is not here denied by the learned counsel for the defendant. They only contend against certain features in the certificate before us. This court, following universal authority, has recently defined a negotiable instrument to be one which runs to order or bearer, is payable ³⁵¹ in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency: *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128. If the certificate in question does not conform to these requirements, it must be held to be non-negotiable.

The first objection is that it is not made payable in "money," that "current funds," in which it is made payable, should not be judicially interpreted to mean "money." We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term "current funds," when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that, when thus construed, a certificate of deposit payable in current funds is in this respect negotiable. It is well known that certificates of deposit are commonly made payable in "currency" or in "current funds," and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments, an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts hold that evidence may be received to show the meaning of the terms "currency," "current funds." But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa, the court holds that notes payable in currency are *prima facie* non-negotiable, but that evidence may be received to prove that the word "currency" describes that which by custom or law is money, and thus the instruments may be shown to be commercial

paper: *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244. On the other hand, in Michigan, it was held that where a certificate of deposit was made payable in currency, "prima facie, at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par." "Such we think," said the court, "is the general signification, the fair import and the ordinary legal effect of the term": *Phelps v. Town*, 14 Mich. 374; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756.

352 Still other authorities hold that the terms "currency" or "current funds" used in commercial paper, *ex vi termini*, mean money. Judge Campbell, in *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162, after a critical examination of a mass of authorities, declared that, with few exceptions, "the general course of authority is in favor of the negotiability of paper payable in currency, or in current funds. And these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized."

"The term 'funds,'" say the court in *Galena Ins. Co. v. Kuper*, 28 Ill. 332, 81 Am. Dec. 284, "as employed in commercial transactions, usually signifies money. Then the term 'current funds' means current money, *par funds*, or money circulating without any discount." Respecting an instrument payable in "current funds," the Maryland court said: "The words 'current funds,' as used in the paper before us, mean nothing more or less than current money, and so construed the instrument was negotiable": *Laird v. State*, 61 Md. 311. See, also, *Miller v. Race*, 1 Burr. 452; 1 Smith's Leading Cases, 808. The supreme court of the United States had occasion, in *Bull v. Bank of Kasson*, 123 U. S. 105, 8 Sup. Ct. Rep. 63, to pass upon the negotiability of an instrument which had been made payable in "current funds." That court said: "Undoubtedly, it is the law that, to be negotiable, a bill, promissory note, or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'cur-

rent funds' has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current ³⁵³ by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words": See *Chrysler v. Renois*, 43 N. Y. 209; *Howe v. Hartness*, 11 Ohio St. 449, 78 Am. Dec. 312; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119. The case of *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773, 3 N. W. 357, holding that a certificate of deposit payable in currency is negotiable is sometimes cited as distinguishing between "currency" and "current funds," but we think the distinction is more in language than in meaning, for the Wisconsin court, after carefully defining the term "currency," add: "This construction of the term 'currency' might, perhaps, properly be extended to the term 'current funds.' It must extend to the latter term whenever it is used in the legal sense of money."

Another contention of the defendant is, that the certificate of deposit is not negotiable because it is not payable absolutely, but only contingently, "on return of this certificate properly indorsed." We think this is not such a contingency as affects the negotiability of the certificate. The language expresses no more than the law implies as the duty of the holder in the absence of any such stipulation: 2 *Daniel on Negotiable Instruments*, sec. 1707; *Smilie v. Stevens*, 39 Vt. 315.

Further, it is contended that this certificate is uncertain as to amount, by reason of the interest clause; and therefore is not negotiable. No time of payment is mentioned in the certificate. It is accordingly payable on demand. If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate. If payment be not demanded until after six months, the amount payable is equally certain; it is the face of the certificate and interest to the time of payment. In this respect, the certificate is like a note payable at a time certain, with interest at a specified rate, from the date of the note, or from maturity, if it is not paid at maturity. Such notes are held negotiable. As in the case of a note on demand or on time, the time when it may be actually paid is uncertain, so it is uncertain when this certificate may be presented and payment demanded. But whenever ³⁵⁴ that may be, the sum to become absolutely payable upon it at any given time is ascertainable upon

its face, and that is sufficient: *Smith v. Crane*, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633; *Towne v. Rice*, 122 Mass. 67; *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567; *Crump v. Berdan*, 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559; 1 *Daniel on Negotiable Instruments*, sec. 53. This disposes of the exceptions relating to the negotiability of the certificate.

At the trial, the plaintiff claimed that Olive Hodge, when she indorsed the certificate, gave it to her as her property, and this the defendant denied. The defendant requested the presiding justice to instruct the jury that "if it was a mere gift made by Olive Hodge to the plaintiff in manner aforesaid it would not authorize her, the plaintiff, to demand payment of the balance remaining unpaid represented by the certificate but still unpaid after her [Olive Hodge's] death," which request was refused, and exception was taken.

We do not think, upon the facts stated, that this exception raises any question of law. The bill of exceptions does not state what was the "manner aforesaid" in which the gift was made; it merely states that it was "a question in dispute between the parties" whether there was a gift or not.

If there was a gift, which was a question of fact, of course, the property in the certificate remained in the plaintiff both before and after the death of Olive Hodge.

Exceptions overruled.

NEGOTIABLE INSTRUMENTS.—THE ESSENTIALS OF a negotiable note are a date, an unconditional promise to pay money, a fixed time for payment, a definite amount to be paid, and a place where payment is to be made: *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572.

NEGOTIABLE INSTRUMENTS.—A CERTIFICATE OF DEPOSIT in the usual form issued by a bank and made payable to order or bearer is negotiable: *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016.

SWIFT v. GUILD.

[94 Me. 436, 47 Atl. 912.]

EXECUTIONS—SALES UNDER—RECORD OF LEVY.—A levy on land under an execution is not effectual against a subsequent purchaser from the judgment debtor, without notice of such levy, unless it is recorded as provided by statute, but such unrecorded levy, if followed by a regular sale, as against the judgment debtor, conveys title to the purchaser.

L. F. Starrett, for the plaintiff.

C. E. and A. S. Littlefield, for the defendant.

⁴³⁸ STROUT, J. The contention is whether the sale of the land in controversy on execution, by the officer, was valid and sufficient to vest the title in plaintiff's grantor.

Sales by an officer are in invitum, and his return must show compliance with the statute requirements. Here the officer returns that he seized the land on February 21, 1893, and on the same day posted the required notices and within the time limited by statute advertised notice of sale, and sold the property on April 8, 1893; but his return does not show that within five days after the seizure he filed in the registry of deeds "an attested copy of so much of his return on the execution as relates to the seizure, with the names of the parties, the date of the execution, the amount of the debt and costs named therein, and the court by which it was issued," as provided by the Revised Statutes, chapter 81, section 59. It is claimed that this omission is fatal. No other objection is raised.

The officer must first seize the land. If it is proposed to make an extent upon it, the seizure is regarded as complete and the extent commenced when the appraisers are chosen and sworn: *Allen v. Portland Stage Co.*, 8 Me. 210; Rev. Stats., c. 76, sec. 22.

If proposed to sell a right of redemption, "the seizure on execution is considered made on the day when notice of the sale is given": Rev. Stats., c. 76, sec. 38.

Prior to the enactment of chapter 80 of the statute of 1881, now incorporated in the Revised Statutes, chapter 76, section 42, unencumbered land could not be sold in execution. By that statute such real estate may be sold "as rights of redeeming real estate mortgaged are taken on execution and sold." The seizure in such case is deemed complete when the notice of sale is given. Subsequent proceedings relate to the ⁴³⁹ time of seizure, and the sale may in fact be made after the return day of the execu-

tion, if the seizure was during its life: Rev. Stats., c. 76, sec. 38.

Prior to the statute, chapter 241 of the laws of 1880, now contained in chapter 81, section 59, of the Revised Statutes, no record of a seizure on execution was required for any purpose. If the seizure was made by posting notice, in case of sales of equities, or by choosing and having sworn the appraisers, in case of an extent—and these proceedings were followed to completion as provided by law—the title of the judgment debtor passed as of the date of the seizure; all intervening attachments or conveyances were cut off: *French v. Allen*, 50 Me. 437. But it was obvious that after such seizure, and before sale or extent, the debtor might convey the land to a bona fide purchaser, who had no knowledge of the seizure and no means of acquiring it, and such purchaser might find his title invalid, as a result of a subsequent sale or extent upon the land.

To obviate this danger, and to afford protection to innocent parties, the statute was amended so as to provide, as it now does, that "no seizure of real estate on execution, where there is no subsisting attachment thereof made in the suit in which such execution issues, creates any lien thereon," unless recorded within five days. It will be observed that a record of seizure is not required, if there was an existing attachment, because the record of that would be notice of the encumbrance. As against the judgment debtor, the seizure is good, if not recorded, but it does not create a lien which may displace subsequent bona fide purchasers without notice. That such is the true construction of the statute is apparent from the later language of the same section, that if the copy of the officer's return is "not so filed the seizure takes effect from the time it is filed." The same provision is made as to recording attachments. In neither case is the attachment or seizure declared invalid, if not recorded within five days, nor is a new attachment or seizure required, but the protective lien attaches when the record is made, deriving its vitality from the antecedent seizure or attachment. The record is important to protect innocent parties; it is of no importance to the debtor. He does not ⁴⁴⁰ suffer if a record is never made, nor can he be injured by a subsequent sale or extent upon the land, under an unrecorded seizure.

As against this defendant, the judgment debtor, the seizure and sale in this case were sufficient to vest the title in the purchaser, the plaintiff's grantor, although the seizure was not recorded in the registry of deeds. It would be otherwise as

against a bona fide purchaser, after the seizure and before the sale, who had no notice of the seizure on execution: *Houghton v. Bartholomew*, 10 Met. 138, approved by this court in *Hobbs v. Walker*, 60 Me. 184; *Bagley v. Bailey*, 16 Me. 154. In *Carleton v. Ryerson*, 59 Me. 438, and *Bessey v. Vose*, 73 Me. 217, the rights of innocent parties were involved.

Registry laws are designed for the protection of innocent parties, and should be so construed as to effect that object, and not operate an injustice. In this view the courts have very generally held that actual notice of a prior conveyance or other infirmity of title is equivalent to registry: *Houghton v. Bartholomew*, 10 Met. 138.

The ruling excepted to was in accordance with these views. Exceptions overruled.

EXECUTION, RECORDING.—It is necessary to the validity of a levy of execution on real estate that the execution and the officer's return thereon should be recorded within the life of the execution and before the return: *Little v. Sleeper*, 37 Vt. 105, 86 Am. Dec. 697. But see *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

GETCHELL v. BIDDEFORD SAVINGS BANK.

[94 Me. 452, 47 Atl. 895.]

HUSBAND AND WIFE—GIFTS—DELIVERY.—If a husband with his own money buys corporate stock and has the certificates made out in the name of his wife, but holds them without delivery to her, or expressly declaring a trust in her favor, the title to the stock does not vest in her.

HUSBAND AND WIFE—GIFTS—DELIVERY.—If a husband deposits his own money in bank in the name of his wife, without delivering the bank-book to her, or expressly declaring a trust in her favor, such money does not vest in her.

GIFTS—DELIVERY.—To constitute a gift there must be a delivery to the donee or an express declaration of trust in his favor.

H. Fairfield and L. R. Moore, for the plaintiff.

E. Stone, for the defendants.

456 EMERY, J. These cases come before the law court upon report with a brief but comprehensive record from which all mere formal and irrelevant matters have been eliminated. By making up such a record, counsel have saved their clients expense and

costs, and have presented the case more clearly, without in the least endangering any right. Such a course is commended.

The competent evidence leads us to believe the following to be the material facts. Mr. Moore, in the lifetime of his wife, purchased five shares in the Biddeford National Bank, which he paid for with his own money. The certificates, however, were at his request made out in the name of his wife. These certificates he kept in his own files in the bank vault, and he drew the dividends, receipting for them in his own name. It does not appear that his ⁴⁵⁷ wife ever had the certificates or ever knew that the shares were in her name. After her death, Mr. Moore surrendered the certificates to the bank and induced the bank officers to issue new certificates in his own name.

Also in his wife's lifetime, Mr. Moore deposited a sum of his own money in her name in the York County Savings Bank, taking out a deposit-book in her name. Later he withdrew this deposit from that bank and deposited it in the Biddeford Savings Bank and again taking out a deposit-book in her name. This book was kept at the bank, Mr. Moore being one of its officers. It does not appear that either deposit-book was ever seen by Mrs. Moore, or that she ever knew of either deposit. Shortly after her death, Mr. Moore induced the bank to pay to him the entire deposit.

Mr. Moore did not make to either bank, or to his wife, any statement of his purpose in either of these transactions. So far as appears, he had the stock and money put in his wife's name merely for his own convenience, or to become her property in case she should survive him, but otherwise to remain his property.

Mr. Moore, however, survived his wife some eight years. After his death her heirs procured the appointment of the plaintiff as administrator upon her estate. The plaintiff thereupon brought a bill in equity against the National Bank to compel it to issue to him as such administrator certificates for the five shares of its stock. He also brought an action at law against the Savings Bank to recover the amount of the deposit standing in her name at her death.

We have no occasion to consider what would have been Mrs. Moore's right in this property after the death of her husband had she survived him, for she did not survive him. Nor is it the question whether the transactions above recited operated to vest in Mrs. Moore in her lifetime the strict legal title to the property. That might be, and yet the actual beneficial ownership remain all the time in Mr. Moore. In such case she would simply

have held that legal title in trust for him, and the court could compel her administrator to transfer it to the administrator of Mr. Moore's estate: *Gray v. Jordan*, 87 Me. 140, 32 Atl. 793. The only question is ⁴⁵⁸ whether the actual, beneficial ownership was transferred to Mrs. Moore, for, if it was not, her administrator cannot maintain a suit against either bank for yielding up the property to the actual beneficial owner.

That such ownership was not transferred to Mrs. Moore must be apparent. There was no gift completed by delivery, nor was there any complete declaration of trust in her favor—one or the other of which was essential to vest the property in her: *Robinson v. Ring*, 72 Me. 140, 39 Am. Rep. 308; *Northrop v. Hale*, 73 Me. 66-71; *Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840.

The plaintiff urges that, as between husband and wife, it should be presumed that a gift was intended. That relationship is a circumstance, but not a controlling one. Even if a gift was intended, it was not perfected: *Kennebec Sav. Bank v. Fogg*, 83 Me. 374, 22 Atl. 251.

Bill in equity dismissed with costs. Judgment for the defendant in the action at law.

GIFT.—WHERE ONE DEPOSITS MONEY in a savings bank in the name of another, without any declaration of trust, and retains the deposit-book until his death, a gift is not effected: *Robinson v. Ring*, 72 Me. 140, 39 Am. Rep. 308. See, further, the monographic note to *Williamson v. Yager*, 34 Am. St. Rep. 219-222; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390.

WEEKS v. CRIE.

[94 Me. 458, 48 Atl. 107.]

CONTRACTS.—THE STATUTE OF FRAUDS is as applicable to executory as to executed contracts.

CONTRACTS—STATUTE OF FRAUDS.—If there are two separate contracts for the sale of different articles, the acceptance and receipt of one of the articles do not take the contract for the other out of the statute of frauds; but if there is but one contract for the sale of the two articles, negotiated it may be successively, delivery and acceptance of one of the articles takes the other out of the statute.

CONTRACTS—STATUTE OF FRAUDS.—ACCEPTANCE and receipt of part of the articles purchased under one contract of sale, or of all of one class of articles so purchased, necessarily take the whole contract out of the statute of frauds.

CONTRACTS—STATUTE OF FRAUDS.—The application of the statute of frauds in the case of the purchase of a number of articles at the same transaction depends upon whether there is one contract or more, in many instances, and the fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time and place, or in the conduct of the parties, that the whole may be fairly considered as one transaction.

CONTRACTS—ENTIRETY.—Whether negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances and raises a question of fact which is properly passed upon by the jury.

CONTRACTS—ENTIRETY.—If the circumstances are such as to lead to a reasonable supposition that the parties intended that a whole series should constitute but one trade or transaction, they may be regarded as one entire contract; otherwise not.

J. E. Moore, for the plaintiff.

R. F. and J. R. Dunton, for the defendants.

460 SAVAGE, J. At the trial of this case, the plaintiff claimed and introduced evidence tending to show that the defendants, in November, 1898, orally agreed to sell him from three to five hundred drums of hake at one dollar and sixty-five cents per kentle, to be delivered at Rockland when called for by him; and at the same interview agreed to sell him ten barrels of split herring at four dollars and twenty-five cents per barrel, to be delivered in Rockland **461** by next boat from Criehaven, which would be within one week; that he, the plaintiff, orally agreed with the defendants to purchase the hake and the herring upon these terms. It was admitted by the defendants that they sold the herring to the plaintiff, as claimed, and that they were delivered according to the agreement, and paid for by the plaintiff. The plaintiff, in January, 1899, demanded three hundred drums of hake to be delivered in accordance with the alleged agreement, but the defendants refused to deliver them; and to recover damages for that alleged breach of contract this action was brought.

The defendants denied that they agreed to sell any hake to the plaintiff. But the jury, under instructions to which no exceptions were taken, have found they did make such a contract. In this contingency, the defendants claim that, if any such contract of sale was made, it was oral merely, and, being for more than thirty dollars, it was invalid under the statute of frauds. The case shows that no memorandum was made, and nothing was given in earnest to bind the bargain; and the defendants claim that no part of the goods sold were accepted and received

by the purchaser, so as to bind the defendants to deliver the hake. This last proposition is controverted by the plaintiff, and hereon, as will be seen, the case hinges.

The presiding justice, among other things, instructed the jury that "if the contract for the hake and the contract for the herring were made at the same interview, even if the contract for the hake was finished and concluded before the contract for the herring was made, that even under those circumstances the delivery of the herring would take the sale of the hake out of the statute of frauds," and further, that "if the defendants agreed to sell the hake in controversy here to the plaintiff, and the plaintiff agreed to purchase them—if their minds concurred in making such a contract—the plaintiff would be entitled to recover, regardless of the statute of frauds."

To these instructions the defendants have excepted. It will be observed that the presiding justice in both instructions virtually withdrew from the jury the consideration of any facts upon which ⁴⁰² the defense of the statute of frauds was based. In the latter instruction he did so expressly. He placed the right of the plaintiff to recover solely upon the determination of the question whether there was in fact an agreement of sale between the parties—whether their minds met. But in the former instruction he no less withdrew from the jury the consideration of the statute of frauds, for he instructed the jury that the delivery of the herring, a fact not in dispute, would take the sale of the hake out of the statute "if the contract for the hake and the contract for the herring were made at the same interview," a fact likewise not in dispute, if any contract was made for the hake. That is, the defendants, by their bill of exceptions, do not show or claim that if any contract was in fact made for the hake, it was not made at the same interview in which the contract for the herring was made. That question does not appear to have been controverted. If it was, it was incumbent on the defendants to have made it appear so in their bill of exceptions. The only question, therefore, really passed upon by the jury under either instruction, or both combined, was whether the parties made a contract for the hake, and the jury found that they did.

The statute of frauds (Rev. Stats., c. 111, sec. 4) provides that "no contract for the sale of goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party

to be charged thereby, or by his agent." The contracts for the hake and the herring, regarding them now separately, were both executory contracts. One applied to three hundred drums of hake, with an option in the purchaser to take not exceeding five hundred drums, to be delivered when called for; the other applied to ten barrels of herring, to be delivered by next boat, within one week. But the statute of frauds is as well applicable to executory contracts as to executed: *Edwards v. Grand Trunk Ry.*, 48 Me. 379; *Carman v. Smick*, 15 N. J. L. 252; *Gilman v. Hill*, 36 N. H. 311.

The plaintiff, however, contends that the contracts for the hake ⁴⁶³ and the herring constituted in fact but one entire contract for hake and herring, and that his acceptance and receipt of the herring, a part of the merchandise contracted for, took the sale out of the statute, as to the whole. The defendants admit the "delivery" of the herring, and we understand from that admission that they also admit that the herring were accepted and received by the plaintiff. The phrase "delivered by the seller" is frequently used in such cases in the sense of "accepted and received by the purchaser," and not unnaturally, for a receipt by the purchaser necessarily presupposes a delivery by the seller. This is not entirely accurate, however, for the statute makes acceptance and receipt by the purchaser the test of the removal of the statutory bar.

Now if there were two separate contracts of sale, one for the herring and one for the hake, it is clear that the acceptance and receipt of the herring did not take the contract for the hake out of the statute, for an acceptance under one contract cannot make another contract valid. But if there was in fact only one contract, for both herring and hake, negotiated for, it may be, successively, a delivery followed by an acceptance and receipt of the herring did take the hake out of the statute. It is unquestionably the law, in such case, that an acceptance and receipt of part of the articles purchased, or of all of one class of articles purchased, necessarily take the whole contract out of the statute: *Elliott v. Thomas*, 3 Mees. & W. 170. So that if the contract in this case was single and entire, it was proper for the presiding justice to rule that the delivery of the herring took the hake out of the statute. For although the question whether there is an acceptance and receipt under the contract is ordinarily for the jury, yet, in this case, the admission that the herring was so accepted carried with it necessarily the contract as to the hake, provided only that it was a single contract. There was nothing

left on this point for the jury to decide. But this conclusion follows only upon the assumption that there was but a single contract. The application of the statute of frauds, in case of the purchase of a number of articles at the same transaction, may depend upon whether there is one contract or more. The mere fact that a separate price is agreed upon ⁴⁶⁴ for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered as one transaction: Browne on the Statute of Frauds, sec. 314; Baldey v. Parker, 2 Barn. & C. 37; Scott v. Eastern Counties Ry. Co., 12 Mees. & W. 33. Such is the common case of a number of articles purchased at private sale, of a shopman for instance, at the same time, though at separate prices: Browne on the Statute of Frauds, secs. 335, 336. The same doctrine was applied in a case where the parties made bargains for the purchase and sale of several lots of timber, at different places some miles apart, the bargains being made at the different places and at separate prices, but all on the same day: Biggs v. Whisking, 14 Com. B. 195. Such purchases may be regarded as entire, though composed of separate parts. But whether such negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact properly to be passed upon by a jury. Were the transactions near in time or place, or similar in circumstances? What was the conduct of the parties? Was the seller a merchant engaged in the regular course of his business in his shop or store? What was the language used? What are the proper inferences to be drawn as to the intention of the parties? The answers to these and other like questions solve the problem. If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one trade, they may be regarded as one entire contract; otherwise, not.

Now, in the case at bar, the jury were instructed, in effect, that if the two contracts for sale were made at the same interview, that would be sufficient. We think this ruling was erroneous. Even if there were no other facts or circumstances to be considered, which is hardly supposable, it cannot be said as a matter of law that the mere fact that the negotiations for the herring and the hake were made at the same interview resulted in a single contract. They may have constituted one contract only,

and they ⁴⁶⁵ may not. If not, then the hake were not taken out of the statute by the acceptance of the herring. Whether the negotiations constituted one contract or more was a question of fact, and should have been submitted to the jury.

Exceptions sustained.

CONTRACTS.—THE STATUTE OF FRAUDS has no application to executed, but to executory contracts: *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39, 23 South. 994, 26 South. 974.

STATUTE OF FRAUDS.—THE ACCEPTANCE OF PART of the property sold takes a case out of the statute of frauds: *New England etc. Co. v. Standard etc. Co.*, 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112. In case of a joint order of goods of different classes at different prices, the delivery and acceptance of one kind will be sufficient; but on a sale of two different articles to be delivered at different times and paid for as delivered, the delivery and acceptance of one will not take the contract out of the statute as to the other: See the monographic note to *Shindler v. Houston*, 49 Am. Dec. 339.

LAMBERTON v. GRANT.

[94 Me. 508, 48 Atl. 127.]

CONSTITUTIONAL LAW—FOREIGN JUDGMENTS.—Under the provision of the national constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, a judgment of a court of another state is made, in an action thereon, a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can be executed in the latter only as its laws may permit. It is put upon the footing of a domestic judgment, by which is meant not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the case, or subject matter of the suit.

STATUTES.—IN THE INTERPRETATION of a statute recourse is properly had to the decisions of the courts which have placed a construction upon it in the state in which it is enacted. Such decisions are deemed essentially part of the law itself.

CONTRACTS—REMEDIES—CONFLICT OF LAWS.—Remedies on contracts are to be regulated and controlled by the law of the place where the action is brought, and not by the law of the place of the contract.

CONFLICT OF LAWS.—STATUTES OF LIMITATION are laws of process, and if they do not extinguish the right itself, are deemed to operate upon the remedy merely, and all questions arising under them must be determined by the law of the forum, and not by the law of the situs of the contract.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If a statute of limitations of another state prescribes the effect of ab-

sence from the state with respect to the time when an action may be commenced, and pertains solely to the remedy, and neither interprets, qualifies, nor extinguishes the right, it does not constitute a part of a judgment of a court of that state nor follow it beyond the limits thereof, and it cannot be asserted in support of an action in another state.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If the statute of limitations of a state not only destroys the right of action but also the cause of action, it may be successfully invoked as a bar to the action in whatever state the action may be brought.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—The plea of the statute of limitations to an action instituted in one state on a judgment obtained in another is a plea to the remedy, and the *lex fori* controls.

G. W. Heselton, for the plaintiff.

H. M. Heath and C. L. Andrews, for the defendant.

509 WHITEHOUSE, J. This is an action of debt on a judgment for nine thousand three hundred and thirty-eight dollars and eighty-five cents rendered by the district court of Minnesota November 10, 1877. The cause of action on which the judgment was rendered accrued September 1, 1873, through a guaranty by the defendant of certain promissory notes dated respectively June 30 and July 17, 1871. The plaintiff is a resident of Minnesota and the defendant a resident of Farmingdale in the state of Maine. The writ in this case is dated January 28, 1899.

It appears that no part of this judgment has ever been paid. Section 1 of article 4 of the constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; and the act of Congress passed May 26, 1790, after providing the mode of authentication, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." By this law the judgment of the court "is made a debt of record, not examinable upon its merits; but it does not carry with it into another state the efficacy of a ⁵¹⁰ judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there and can only be executed in the latter as its laws may permit. . . . It is therefore put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment but a domestic judgment as to the merits

of the case, or subject matter of the suit": *McElmoyle v. Cohen*, 13 Pet. 312.

In the case at bar, however, no question is made respecting the validity of the judgment in suit at the time it was rendered by the court in Minnesota. The defendant was a resident of that state at the time of the commencement of the action in which this judgment was rendered, and duly appeared by counsel and answered to the suit. There is no suggestion, and nothing upon the face of the record to show, that the district court of Minnesota did not have jurisdiction of the subject matter of the suit as well as of the parties thereto. Its adjudication, therefore, established the relation of debtor and creditor between the parties and determined the amount of the indebtedness as a matter of record. It was a final and conclusive judgment between them.

But the defendant pleads nul tiel record and, in accordance with the specification set out in his brief statement, contends that under a statute of Minnesota, which is printed as a part of the record in this case, the judgment in suit survived for a period of ten years and no longer, and that it accordingly ceased to exist as a judgment on the tenth day of November, 1887.

Section 254, title 21, of chapter 66 of the General Statutes of Minnesota for 1866, as amended by chapter 67 of the Session Laws of 1870, is as follows: "On filing a judgment-roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment from the time of docketing the same becomes a lien on all the real property of the debtor in the county owned by him at the time of the docketing of the judgment, or ⁵¹¹ afterward acquired; said judgment shall survive, and the lien thereof continue, for the period of ten years and no longer."

In this amended form, the statute has been in force as the law of Minnesota since February 12, 1870. In the General Statutes of 1878, it appears as section 277 of chapter 66. It is shown by the transcript of the record introduced in evidence that the judgment in suit was one for the payment of money and that it was filed and docketed November 10, 1877. It is, therefore, confidently claimed in behalf of the defendant that the rights of the parties to this suit must be determined by the provisions of this statute, and that according to its plain and unambiguous

terms the judgment in suit has been extinct more than eleven years prior to the commencement of this action. It could "survive for the period of ten years and no longer" from November 10, 1877.

In the interpretation of a statute recourse is properly had to the decisions of the courts which have placed a construction upon it in the state in which it was enacted, such decisions being deemed essentially a part of the law itself. So, in determining what scope and effect shall be given to the statute above quoted, recourse is necessarily had to the official opinions of the supreme court of Minnesota. It is contended by the defendant that the construction given to the statute by that court is in harmony with his contention that the judgment declared upon was not in existence at the date of the plaintiff's writ.

In *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732, decided August 5, 1881, the judgment was rendered, filed and docketed June 23, 1870, and on the twenty-first day of September, 1878, the plaintiff brought a creditor's bill asking that certain property belonging to the defendant, on which he had no statutory lien, might be applied in part satisfaction of his judgment. October 8, 1880, the district court rendered its decision for the defendant holding that the judgment ceased to exist June 23, 1880, during the pendency of the plaintiff's bill. On appeal the decision of the district court was affirmed by the supreme court. In the opinion the court say: "The plaintiff's right to the relief sought depends entirely upon the existence of his judgment. . . . If the plaintiff's ⁵¹² judgment is dead, his whole case falls to the ground. It is provided by statute that a 'judgment shall survive, and the lien thereon continue, for a period of ten years and no longer': Gen. Stats. 1878, c. 66, sec. 277. In the present case this period expired June 23, 1880, and during the pendency of this action. Hence, before the final trial and decision of this case, and before judgment rendered thereon, plaintiff's judgment had ceased to exist either as a cause of action or a lien, unless kept alive by the commencement and pendency of this action beyond the statutory period of ten years. . . . We do not think the pendency of this action had any such effect. . . . We are, therefore, of opinion that plaintiff's judgment became barred and ceased to exist either as a cause of action or as a lien during the pendency of this action." This decision was rendered by a unanimous court and stands unreversed.

In *Dole v. Wilson*, 39 Minn. 330, 40 N. W. 161, a judgment was recovered against the defendant in the district court for ten

thousand dollars in October, 1876. On appeal this judgment was affirmed by the supreme court in October, 1877, and a second judgment for thirty-one dollars costs was rendered against him. By reason of the false representations of the defendant in regard to his financial condition, the plaintiff refrained from taking any measures to enforce these judgments until October, 1887, more than ten years after the recovery of the judgment in the district court. He then brought this bill in equity to reach property alleged to have been conveyed by the defendant to his wife in fraud of creditors. In refusing to grant the relief thus sought the court say: "This action was commenced in October, 1887, more than ten years after the recovery of the plaintiff's judgment in the district court, but a little less than ten years after his judgment for costs in this court. The plaintiff is seeking through the equitable jurisdiction of the court to have this land appropriated to the satisfaction of his judgment after the judgment itself has expired by lapse of time. Equity will regard the statutory limitation upon the life and enforceability and will not interfere to enforce its satisfaction by means of its peculiar remedies, . . . if by the plaintiff's own neglect the judgment ⁵¹³ has been suffered to remain unsatisfied until it ceased to exist as a legal obligation."

"As respects the judgment for costs in this court, the result is the same. That judgment was still in force when this action was commenced, but it had expired before the cause was brought to hearing in the district court. It was held in *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732, that a judgment is not kept alive by the pendency of an equitable action to enforce satisfaction, and that the expiration of the judgment pending such an action terminates the right of action. As respects the alleged fraudulent conveyance of the defendant, what has been said above is applicable to both judgments alike. But as this latter judgment was still a valid obligation when this action was commenced, we see no reason why, upon the facts alleged, the plaintiff was not entitled to recover a renewed money judgment against the judgment debtor."

In *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794, decided January 13, 1891, the defendant claimed title to the land in dispute under a sale made May 20, 1872, on an execution issued on a judgment rendered and docketed May 19, 1862. The principal question presented was whether the execution sale took place during the life of the judgment. In the opinion the court say: "It was settled by *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732,

that the sale on execution must be made within the life of the judgment. The case is, therefore, reduced to the proper method of computing time in order to determine when the ten years expired." As May 19, 1872, was Sunday, it was held that under another statute of Minnesota the ten years would include May 20th, and that the sale on the execution was made within the life of the judgment. To like effect was the decision in *Ashton v. Slater*, 19 Minn. 347, and in *Hanson v. Johnson*, 20 Minn. 194.

The defendant claims that by this line of decisions the supreme court of Minnesota has construed the statute in question according to its plain terms and manifest intent, and uniformly held that such a judgment "shall survive for a period of ten years and no longer," and that at the expiration of that time it ceases to exist as a judgment and also as a cause of action. His contention in defense is, ⁵¹⁴ that at the date of the plaintiff's writ in this case, there was no subsisting judgment in Minnesota upon which an action of debt would lie either in Minnesota or in Maine.

On the other hand, the plaintiff argues that the statute upon which the defendant relies must be construed in connection with the statute of limitations of Minnesota. The sections to which he invites special attention are found in chapter 66 of the General Statutes of 1878, as follows:

"Sec. 3. Actions can only be commenced within the period prescribed in this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute.

"Sec. 4. No action for the recovery of real property, or for the recovery of possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the premises in question within fifteen years before the commencement of the action.

"The periods prescribed in the preceding sections for the commencement of action are as follows:

"Sec. 5. Actions upon judgments or decrees.—Within ten years: 1. An action upon a judgment or decree of a court of the United States or any state or territory of the United States."

"Sec. 15. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time herein limited after his return to the state; and if, after the cause of action accrues, he departs from or resides out

of the state, the time of his absence is not part of the time limited for the commencement of actions."

It is conceded that the defendant has not resided in Minnesota since 1877, and the plaintiff claims that section 277 relied upon by the defendant, declaring that judgments "shall survive for the period of ten years and no longer," must be construed in connection with sections 4 and 5, prescribing ten years as the limitation of actions ⁵¹⁵ on judgments and with section 15, relating to absence from the state. He contends that under these statutes, so construed, if the defendant should now return to Minnesota, an action of debt against him on this judgment would be sustained by the courts of that state; and if sustainable in Minnesota, he argues that it is equally sustainable in Maine.

In support of this contention the plaintiff cites two decisions of the supreme court of Minnesota, viz., *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938, and *Osborne v. Heuer*, 62 Minn. 507, 64 N. W. 1151. In the former case (*Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938), the plaintiff recovered judgment March 12, 1883, and brought an action of debt thereon February 17, 1893, but the cause was not decided until February 1, 1894. The defendant invoked the statute relied on by the defendant in this case, and the authority of *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732, in support of his contention that the judgment "survived for a period of ten years and no longer," and that it became extinct during the pendency of the action. In the opinion the courts say, *inter alia*: "There is but one point more which we need to notice, and that is the contention of the defendant that the statute of limitations had run on the plaintiff's cause of action, whereby an action thereon was barred for the reason, as defendant claims, that if the plaintiff would avail itself of the statute, it must conclude, finish, or complete the action and all proceedings thereunder within the ten years. But the General Statutes of 1878, chapter 66, section 277, which provides that such judgment 'shall survive and the lien thereof continue for a period of ten years and no longer,' must be construed in connection with the General Statutes of 1878, chapter 66, sections 4 and 5, which provide that an action may be commenced on a judgment . . . within ten years. This permits an action to be commenced upon any such judgment on the very last day of the ten years limited, and to say that such action would close on the very next day after the expiration of the ten years,

would frequently result in rendering sections 4 and 5 above referred to inoperative. A judgment constitutes of itself a cause of action, and like other causes of action a suit may be brought upon it within the time limited by statute, and such suit may proceed to trial and judgment even ⁵¹⁶ after the expiration of the ten years limited for commencing actions upon such judgments: *Dole v. Wilson*, 39 Minn. 330, 40 N. W. 161."

It has been noticed that in this case the action was commenced within the "period of ten years" after the judgment was rendered and docketed, and that the statute which gives the judgment life for only ten years, and the statute of limitations which bars an action upon it in ten years, could reasonably be construed together in order that the rights of the parties might be determined as of the date of the writ.

Osborne v. Heuer, 62 Minn. 507, 64 N. W. 1151, was an action on a promissory note. The plaintiff had obtained judgment February 16, 1884, and January 2, 1893, the judgment being unpaid. *Holzkamp*, one of the defendants, gave the note in suit, which contained a statement that it was "given for the purpose of securing and getting an extension of time on account of said judgment." The action on this note was commenced prior to February 16, 1894, within ten years from the rendition of the judgment, but was not tried until June, 1894. In reversing the decision of the court below the supreme court say: "When plaintiff rested, the court on motion of the defendants dismissed the action, on the ground, as stated in the record, that the note was given as collateral to the judgment, and inasmuch as the judgment had 'ceased to exist' (meaning, we assume, that it was barred by the statute of limitations), the plaintiff could not recover on the collateral. The correctness of this ruling is the only question presented by this appeal. The court seems to have assumed that the note was simply collateral security for the payment of the judgment. Whether this was correct or whether it operated as conditional payment and a suspension of the debt until the maturity of the note, we need not inquire, for the court was clearly in error in holding that the judgment was barred by the statute of limitations. The giving of the note in question was clearly an acknowledgment and a new promise on the part of *Holzkamp*, which took the case out of the operation of the statutes as to him. The lien of the judgment on real estate, if any, may have ceased by reason of the lapse of ten years from its rendition; but the judg-

ment remained a subsisting debt against Holzkamp, upon which an action might be brought."

⁵¹⁷ The significance of this language in the last sentence of the opinion must be determined with reference to the facts stated, and the question necessarily involved and actually adjudicated. The court simply decided that, where a promissory note is given for a judgment before the expiration of ten years from its rendition an action on the note which is commenced within ten years from the rendition of such judgment is maintainable, although not tried and concluded until after the expiration of such period of ten years. The principle involved in this decision is in entire harmony with the previous decisions of the court and parallel with the doctrine of *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938; and that doctrine, as already seen, is that although section 277 declares that a judgment "shall survive ten years and no longer," yet, in order to give reasonable scope to sections 4 and 5 of the statute of limitations, an action on a judgment commenced within ten years from its rendition may be finished after the expiration of the ten years. But the case is plainly not an authority for the proposition that either section 277, chapter 66, of the General Statutes of 1878, or section 5 of the statute of limitations or any other statute of Minnesota, authorizes the maintenance of an action of debt on a judgment commenced more than ten years after its rendition. Nor has any other case been cited by counsel or otherwise brought to the attention of the court in which it has been so held by any court in Minnesota.

Nor has any case been discovered in which it has been held by the courts of Minnesota that section 277 of chapter 66 should be construed in connection with section 15 of the statute of limitations, providing that the time of the defendant's "absence from the state is not a part of the time limited for the commencement of actions," so that an action on this judgment might now be maintained against the defendant in Minnesota if he should return and be served with process in that state.

But whether or not an action on this judgment is now maintainable in Minnesota in the event above named is a question which the decision of the principal case does not require the court to determine. Assuming that it might be held in that state that ⁵¹⁸ under section 277 the judgment "survived ten years and no longer," and had ceased to exist as a judgment, but that under section 15 of the statute of limitations the judgment might still be received there as sufficient evidence of a

subsisting debt to support an action upon it by proving the defendant's nonresidence, it by no means follows that an action of debt on the judgment can be maintained in this state, against the defendant's plea of nul tiel record, by virtue of a provision in the statute of limitations of Minnesota regulating the remedy in that state. It is a well settled and familiar principle that remedies on contracts are to be regulated and controlled by the law of the place where the action is brought, and not by the law of the place of the contract: *Thibodeau v. Levassuer*, 36 Me. 362; *Mowry v. Cheesman*, 6 Gray, 515; *Wood's Limitation of Actions*, sec. 8, and cases cited. It is equally well settled that laws of limitation are laws of process, and, where they do not extinguish the right itself, are deemed to operate upon the remedy merely, and all questions arising under them must in like manner be determined by the law of the forum and not by the law of the situs of the contract: *De Couche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478; *McElmoyle v. Cohen*, 13 Pet. 312; *Wharton's Conflict of Laws*, sec. 533. In *Townsend v. Jemison*, 9 How. 407, the court say: "The uniform administration of the law has been that the *lex loci contractus* expounds the obligation of contracts, and a statute of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains *ad tempus et modum actionis institudendae*, and not *ad valorem contractus*."

It cannot be questioned that sections 4, 5, and 15 of chapter 66 of the General Statutes of Minnesota of 1878 are distinctively a statute of limitations. Sections 4 and 5 expressly relate to the "time of commencing actions," and section 15 prescribes the "effect of absence from the state" with respect to the time when an "action may be commenced." This enactment is uniformly treated as an ordinary statute of limitations by the courts of Minnesota, as shown by the cases above cited from that state. It prescribes a law of process, and pertains solely to the remedy. It neither interprets, qualifies, nor extinguishes the right conferred by the judgment.⁵¹⁹ It does not constitute a part of the judgment, and cannot follow it beyond the bounds of Minnesota. Its field of operation is in the enacting state, and it cannot be asserted in support of the plaintiff's action in a sister state.

On the other hand, the principle is equally well settled that when the statute in question not only destroys the right of action, but operates also to extinguish the cause of action, the

right or debt itself, it may be successfully invoked as a bar to the action in whatever state it may be brought: Wharton's Conflict of Laws, sec. 538; Wood's Limitation of Actions, secs. 8, 9, and authorities cited. In such case the *lex loci contractus*, and not the *lex fori*, will control: *McMerty v. Morrison*, 62 Mo. 140; *Fletcher v. Spaulding*, 9 Minn. 64. In Wood's Limitation of Actions, section 8, the author says: "Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim of title or cause of action itself, *ipso facto*, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy."

It has been seen that section 277 of chapter 66 of the General Statutes of Minnesota for 1878 declares that a money judgment "shall survive for ten years and no longer," and that under the decisions of that state it ceases to exist as a judgment at the end of that time. This statute prescribes the condition on which the plaintiff accepted his judgment. It is a qualification of his right in the statute creating it. Its purpose was not to limit the right of action upon it. That purpose is accomplished by section 5 of the statute of limitations, declaring that the action must be commenced within ten years. Section 277 is not a statute of limitations. It was distinctly so held in *Ashton v. Slater*, 19 Minn. 347. It extinguishes the judgment itself at the end of ten years. The condition thus becomes an integral part of the judgment and ⁵²⁰ follows it to every jurisdiction in which the parties may reside. After the lapse of ten years it is no longer a subsisting judgment upon which an action of debt can be maintained in this state. True, there is here no statute of limitations upon such a judgment, but only a rebuttable presumption of payment after the lapse of twenty years; and it is conceded that the plaintiff's judgment has not been paid. But by the law of the state creating it, its life was limited to ten years, and after the lapse of twenty-three years it must be held to have expired by its own limitation: See *St. Louis Type Foundry Co. v. Jackson*, 128 Mo. 119, 30 S. W. 521.

Judgment for the defendant.

STATUTORY CONSTRUCTION.—If a statute of a state has been construed by its highest judicial tribunal, such construction ordinarily will be received as conclusive in the courts of other states: *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628.

CONTRACT.—THE LEX LOCI GOVERNS the validity and interpretation of contracts: *Woodward v. Brooks*, 128 Ill. 222, 15 Am. St. Rep. 104, 20 N. E. 685; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363.

THE EFFECT OF THE STATUTE OF LIMITATIONS is to destroy the remedy, without impairing the right: *Ludlow v. Van Camp*, 7 N. J. L. 113, 11 Am. Dec. 529; *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170.

THE STATUTE OF LIMITATIONS OF THE FORUM must govern. Hence a cause of action, not barred where it arose, may be barred by the law where it is sought to be enforced; and, on the other hand, although barred where it arose, may not be barred by the law of the forum: See the monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878; *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 South. 640. But see *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

WILSON v. SIMON.

[91 Md. 1, 45 Atl. 1022.]

STATUTE—REPEAL OF—EFFECT ON EXISTING LIENS. Where an act, which repeals a mechanic's lien law, has no saving clauses in favor of liens then existing, all such liens are obliterated from the laws of the state as completely as if they had never existed, except for the purpose of suits which were commenced, prosecuted, and concluded while it was existing law.

CONSTITUTIONAL LAW—ABOLISHING RIGHT OF ACTION.—Where a right of action springs from contract or from the principles of the common law, it is not competent for the legislature to abolish it.

CONSTITUTIONAL LAW—CHANGING REMEDY—IMPAIRING CONTRACT.—Whatever belongs to the remedy may be altered at the pleasure of the state, provided the alteration does not impair the obligation of the contract, even though the new remedy is less convenient and more difficult than the old one.

MECHANIC'S LIEN—REPEALING ACT—IMPAIRING CONTRACT OBLIGATION—CONSTITUTIONAL LAW.—Where the right to a mechanic's lien springs neither from contract nor from the principles and practices of the common law, but is the creature of positive statutory enactment, such right is not a vested right, but an extraordinary remedy only, which the state may discontinue at pleasure. Hence a repealing statute is not unconstitutional as impairing the obligation of a contract, though it deprives a party of the lien theretofore given him.

LIENS—REPEALING ACT—IMPAIRING OBLIGATION OF CONTRACTS.—A lien given by legislation may be taken away without in any wise interfering with or impairing the obligation of contracts.

Fielder C. Slingluff, George R. Willis, and T. Rowland Slingluff, for the appellant.

Charles J. Bonaparte and Paul M. Burnett, for the appellee.

⁴ PAGE, J. This is a proceeding in equity to enforce a mechanic's lien for materials furnished by the appellant to one Robert V. Saylor, a contractor, to build four houses for the appellee at the corner of Bond street and Fairmount avenue, in the city of Baltimore. The notice required by the eleventh section of code, article 63, was given on the eleventh day of December, 1896, within sixty days after the time of the last delivery, on the 13th of October, 1896. On the 18th of February following, the appellant filed his claim in the office of the clerk of the superior court, and on the same day began these proceedings to enforce the lien. While this suit was pending, and before a hearing was reached, the act of 1898, chapter 502, was passed, by which all the sections in article 63 of the code which provide for a lien for materials furnished for the construction of buildings were repealed, so far as the same were applicable to Baltimore City, and re-enacted so as to provide only for liens for the payment of debts contracted for work. The effect of this statute upon the case at bar is the first matter for our consideration. Must it be construed so as to destroy the appellant's lien? ⁵ And if so, is it invalid in respect to all liens existing and valid at the date of its passage, as being a law impairing the obligation of contracts, and within the inhibition of the constitution of the United States, article 1, section 10, which declares that "no state shall pass any law impairing the obligations of contracts"?

There can be no serious doubt about the first question. In *Dashiel v. Mayor etc. of Baltimore*, 45 Md. 622, this court, citing from *Tindal, C. J.*, said: "The effect of repealing a statute is to obliterate it as completely from the records of parliament as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded whilst it was an existing law." And in *Weiskittle v. State*, 58 Md. 158, "where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled." In the act of 1898 there are no saving clauses in favor of liens for materials then existing, and all the provisions allowing such liens are entirely omitted. All such liens, therefore, are obliterated from the laws of the state as completely as if they had never existed, except for the purpose of suits "which were commenced, prosecuted and concluded whilst it was existing law."

As to the second question there is more difficulty. The con-

tention of the appellant is that at the time the act of 1898 was passed he had a legal vested right to pursue his lien against the buildings for which the materials were furnished, and that it was not within the power of the state to deprive him of that right. The decisions throughout the country are very conflicting. In some of the states it has been held that a mechanic's lien is a vested right, of which the lienor cannot be divested by repealing the statute under which the right accrued, while in other states it is regarded merely as an extraordinary remedy which can be changed from time to time or discontinued according to the will of ⁶ the legislature. The former view has been maintained by the appellate courts in the following states, viz.: Minnesota: *Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262; Wisconsin: *Streubel v. Milwaukee etc. R. R. Co.*, 12 Wis. 71; North Carolina: *Warren v. Woodard*, 70 N. C. 382; Kansas: *Weaver v. Sells*, 10 Kan. 619; Texas: *Blanton v. Langston*, 60 Tex. 149; Indiana: *Goodbub v. Hornung*, 127 Ind. 181, 26 N. E. 770; and Oregon: *Steamer Gazelle v. Lake*, 1 Or. 120. The reasoning upon which these decisions rest seems to be that it must be presumed that, at the time of the agreement, the parties had in view the remedies then existing for the enforcement of the contract, that those remedies therefore became a part of the obligation, and to take them away would be a violation of the contract and impair its obligations. There are some difficulties in applying this reasoning to the case we are now dealing with. In *Sodini v. Winter*, 32 Md. 133, this court said: "This peculiar lien does not originate in contract; it is purely a creature of positive statutory enactment, to be maintained and enforced to the extent and in the mode which the statute prescribes"; and in a later case—*Wehr v. Shryock*, 55 Md. 336—this doctrine was affirmed. Nor is it an exact statement of the law that a party, as an incident of his agreement, has a right to all the remedies for the enforcement of the contract in force at the time it was entered into. A party has no right to a particular remedy. The state is no party to the contract and is bound only to afford adequate process for the enforcement of rights. "Thus a law abolishing distress for rent has been sustained as applicable to leases in force at its passage, and it was also held that an express stipulation in the lease that the lessor should have this remedy would not prevent the legislature from abolishing it, because this was a subject concerning which it was not competent for the parties to contract in such manner as to bind the hands of the state": Cooley's

Constitutional Limitations, marg. p. 288; *Conkey v. Hart*, 14 N. Y. 22; *Sturges v. Crowninshield*, 4 Wheat. 200; *Williar v. Baltimore Butchers' Assn.*, 45 Md. 560. In the case last cited the court ⁷ said where the right of action "springs from contract or from the principles of the common law, it is not competent for the legislature to abolish it." In the leading case of *Bronson v. Kinzie*, 1 How. 315, 316, the court said that: "Undoubtedly a state may regulate at pleasure the modes of proceedings in its courts. . . . And although the new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself": See, also, *State v. Jones*, 21 Md. 437; *McCracken v. Hayward*, 2 How. 613.

The contract under which the appellant parted with his property gave him (aside from the statute) no right to look to the buildings. The owner was not a party to it, and came under no personal obligation to pay him. His right to a lien on the buildings was not a right which sprang either from the obligation or from any of the principles or practices of the common law. It was an extraordinary remedy, the creature of "positive statutory enactment." When it had been discontinued by the passage of the act of 1898 all the contractual and common-law rights of the parties remained. The appellant's right to bring his action, secure judgment and execution, and make sale of Saylor's property remained unimpaired.

In *Stocking v. Hunt*, 3 Denio, 276, when a lease was made there was a law conferring upon landlords the right to claim rent out of the proceeds of property seized on execution on the demised premises. Subsequently, during the pendency of the lease and after two quarters of rent had become payable, the act was repealed. It was contended that the repealing act, because it took away the landlord's preference, operated to impair the obligation of ⁸ the contract, and was therefore invalid. But the court held that the repealing statute "did not impair the obligation to pay rent, nor in the slightest degree interfere with it. He might still be sued, and his entire property was as much subject to execution and sale for the payment of this rent since the repealing act as before"; that "the legislature

was fully competent to pass the statute"; that "it did not touch the obligation of the contract"; and that "the legislature only said that this extraordinary remedy, giving a preference to a landlord over an execution creditor, was unreasonable and should be discontinued." The case of *Williar v. Baltimore Butchers' Assn.*, 45 Md. 560, which was relied upon at the hearing to support the appellant's case, is in line with what has just been said. The appellant had paid a mortgage debt which included usury. Subsequently he brought an action of *assumpsit* to recover the excess of legal interest. While the suit was pending the legislature passed an act which provided that no action for usury should be brought when the evidence of indebtedness had been settled for, unless there had been a renewal in whole or in part of the original indebtedness. The question arose whether this act, by taking away the right to recover the excess of legal interest previously enjoyed by the party, did not impair the obligation of the contract. It was contended by the appellee that the claim of the plaintiff was for the forfeiture or penalty imposed by the code, which it was in the power of the legislature at any time to alter or repeal. The court said the proposition was correct, if that was the nature of the demand, for the reason that such a claim "not resting upon or growing out of contract, but based exclusively upon the statute," it was within the power of the legislature at any time to alter or repeal the statute, "and the right to recover the forfeiture is thereby destroyed, although it may have been incurred before the statute imposing it had been repealed." It was held, however, that such was not the nature of the demand, but that it was one where the "implied *assumpsit* arises at the common law," and was therefore protected by the constitutional provision.

⁹ We are of opinion, therefore, on principle, that the effect of the repealing statute was not to impair any of the obligations of the appellant's contract, though it took from him the lien theretofore given him; and that the right to a mechanic's lien for materials furnished under the law of this state is not a vested right, but an extraordinary remedy only, which the state may discontinue at pleasure.

These views, in accord we think with sound reasoning, are supported by decisions of the appellate courts in many states. We need not review them, for it may be said they all rest upon the theory that the lien given by statutes similar to the mechanic's lien law of his state is a remedy only, and constitutes

no obligation upon the owner of the buildings for which materials were furnished, except to the extent prescribed by statute: *Hanes v. Wade*, 73 Mich. 178, 41 N. W. 222; *Bangor v. Goding*, 35 Me. 73, 56 Am. Dec. 688; *Templeton v. Horne*, 82 Ill. 491; *Woodbury v. Grimes*, 1 Colo. 100; *Seattle etc. R. Co. v. Ah Kow*, 2 Wash. Ter. 36, 3 Pac. 188; *Evans v. Montgomery*, 4 Watts & S. 218. See, also, *Frost v. Illsley*, 54 Me. 345; *Gray v. Carleton*, 35 Me. 481; *Watson v. New York Cent. R. R. Co.*, 47 N. Y. 162; *National Bank v. Williams*, 38 Fla. 305, 20 South. 931; *Hall v. Bunte*, 20 Ind. 304; *Penniman's Case*, 103 U. S. 714, 720. In *Martin v. Hewitt*, 44 Ala. 418, the court said: "A lien given by legislation may be taken away without in any wise interfering with or impairing the obligation of contracts": *Copeland v. Kehoe*, 67 Ala. 597. But see *Florence Gas etc. Co. v. Hanby*, 101 Ala. 15, 13 South. 343.

It follows from what has been said that the decree must be affirmed.

IMPAIRING OBLIGATIONS.—REMEDIES may be changed, but not so as to affect pre-existing contract obligations: *Peninsular etc. Works v. Union etc. Co.*, 100 Wis. 488, 69 Am. St. Rep. 934, 76 N. W. 359. The obligation of a contract cannot be impaired by the legislature, though it may alter the remedy to enforce it at will. If the effect of legislative action is to impair the obligation, it is void, as it is immaterial whether such result is accomplished by acting on the remedy or directly on the contract itself: *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, 42 Pac. 725, and note.

MECHANIC'S LIEN—CHANGE IN LAW.—If the rights of parties to a building contract have accrued under an agreement made before the passage of amendments to the mechanic's lien law, which amendments materially impair the contract rights of the parties, the law in force when such rights accrue, and not the amendments, must govern: *Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259, 42 Pac. 674.

MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH v. HUMPHREYS.

[91 Md. 131, 46 Atl. 320.]

PERPETUITIES—DEVISE WITH NO LIMIT OF TIME—TRUST.—A devise of property to trustees in trust to collect the rents and income and to pay the net rent to certain charities, no limit of time being placed on the duration of the trust, and the intent being to make a perpetual provision for such charities, is void as being in violation of the rule against perpetuities.

PERPETUITIES—RULE AGAINST—TRUST.—A trust authorized by a will, which requires in its execution a period longer

than a life or lives in being, and twenty-one years and a fraction of a year, so that the property is inalienable during that time, creates a perpetuity and is void.

PERPETUITIES—RULE AGAINST—POWER OF SALE AS AFFECTING.—Where a devise in trust may extend beyond the time prescribed by the rule against perpetuities, the fact that the trustees are empowered to change the investments and reinvest as often as may be deemed proper, by making sales or otherwise, does not change the nature of the trust or extricate the case from the operation of the rule. The mere possibility of a continuance is decisive in determining the question of perpetuity.

PERPETUITIES—CHARITABLE TRUSTS.—In Maryland the rule against perpetuities applies to charitable trusts as well as to any other.

James E. Ellegood, G. Grier Radcliff, and Toadvin & Bell, for the appellants.

John Prentiss Poe and Robert P. Graham, for the appellees.

139 FOWLER, J. The question presented by these appeals arises on the construction of the will of the late Willie F. Hooper, of Wicomico county. Mrs. Margaret A. Humphreys, by her husband, filed a bill in the circuit court for that county in which she alleged that the third, fourth, and fifth clauses of her sister's will are void. The defendants were duly summoned and answered. The case was heard by the court below on the bill, answers, and testimony, and after argument a decree was passed declaring that the third and fourth clauses are valid, so far as they relate to the provision therein respectively in favor of the preacher who may be from time to time in charge of said churches respectively; but void so far as the same made provisions for the benevolent boards and the keeping in good condition of the "Hooper burial lot." The decree further declared that the fifth paragraph of the will is void, and that title to the house and lot therein devised to trustees in trust, to rent the same and pay the net rent as therein directed, vested in the plaintiff as sole heir and residuary devisee upon the death of the testatrix. From this decree the trustees named by the testatrix in the fifth item of her will have appealed; and several of the beneficiaries of the trust have also appealed; but both appeals present the same questions. The appellants made no objection in this court to that portion of the decree which relates to the third and four paragraphs; hence the sole question left for our consideration relates to the validity of the devise contained in the fifth paragraph of the will. It is as follows: "I give, devise, and bequeath my house and lot . . . to F. Marion Slemmons, Thomas H. Williams, and E. Stanley

Toadvin in trust, to ¹⁴⁰ hold the said property, and to rent out the same, and collect the incomes and rents therefrom." The testatrix directs her trustees, after the payment of her debts and funeral expenses, to pay the net rent from year to year to a number of incorporated bodies and boards for charitable purposes in certain proportions designated by her.

The contention of the appellee, and this contention was sustained by the court below, is that the devise in the fifth paragraph is void because it creates a trust to which there is no limit of time. Upon an examination of the will itself we not only fail to find an express limitation to the duration of the trust, but the testatrix makes express provision for its indefinite continuance in the seventh paragraph of her will by providing for the appointment of trustees to succeed those she had named in case of the death, resignation, or refusal of the latter to serve. We think there can be no doubt as to the intention of the testatrix. She intended by the creation of this trust to make a perpetual provision for the objects of her bounty. Can we, under the well and long established law of this state, effectuate that intention? We certainly cannot if we adhere to the well-considered decisions of this court from the case of *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, down to the present time. In the case just cited it is said that: "The first and very important question which arises on this statement of the contents of the will . . . is whether the period described in the will, through which the leasing by the trustees is to run, transgresses the rule against perpetuities." It was held that the period of leasing so designated by the testator did plainly violate the rule, and in disposing of the question this court said: "If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and fraction of a year . . . afterward, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity. . . . The question whether an estate is a perpetuity generally arises in cases in which a future ¹⁴¹ contingent estate or executory devise is limited upon a fee, and if the contingency upon which the executory estate is to vest is not necessarily to happen within the time fixed by the rule as the legal boundary, then the precedent estate or estates are denominated a perpetuity, and the executory estate or devise fails for want of a legal estate to support it. . . . The object of the rule is to prevent the tying up of property, real or personal, and rendering it inalienable

longer than the period designated by it. For that time the power over the inheritance or absolute interest of property may be suspended, but no longer."

"In the case now under consideration no question is presented as to the future vesting of an executory estate in order to determine the validity of the preceding one, but simply whether the trusts of the will require in their execution a longer period than that prescribed by the rule against perpetuities, and therefore render the property devised to the trustees inalienable during that time. If so, the law denounces the devise in trust as a perpetuity and declares it void."

In *Deford v. Deford*, 36 Md. 178 (C. J. Bartol being the only judge who sat in that case and also in *Barnum v. Barnum*), Miller, J., in delivering the opinion of the court said, referring to *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88: "All the reasoning in that case applies here, and we regard it as binding and conclusive authority which must, notwithstanding the very able argument of counsel to the contrary, control our judgment in the present case. The courts, in prescribing and settling the rule against perpetuities, have founded it in true wisdom. They have thereby limited the indulgence of the natural inclinations of men to fix control over their property after death . . . by a careful consideration and regard for those larger principles of public policy which are essential to the welfare of communities and states." "The decision in *Barnum's case*," continued the court, "is a fair and just application of the rule." And Perry on Trusts, sections 382 and 383, is cited where it is said: "A perpetuity¹⁴² will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate." In *Goldsborough v. Martin*, 41 Md. 501, it is said that "the rule against perpetuities is one of the established landmarks of the law"; and the rule as applied to trusts in *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, and *Deford v. Deford*, 36 Md. 178, is approved and reaffirmed. We quote from *Deford's case* the following language, which is peculiarly appropriate to the case now before us: "Power is given to the trustee to appoint some one to succeed her in the trust after her death, and this of itself would render possible the continuance of the trust far beyond the prescribed limit. But, besides this, if the trust were valid, and the testator's intention could be carried into effect, a court of equity would be bound to supply a trustee to execute the trust . . . to remote generations."

It was suggested that a power to raise money out of rents and profits includes a power to sell and mortgage for the purposes of the trust, and that the trustees under Miss Hooper's will being required to pay taxes and debts, they may be required to sell the trust property, but, whether this be so or not, we will not stop to inquire, for even if the testatrix had given power to her trustees to sell the trust property, the difficulty would not have been removed. In Deford's case it is said: "The fact that the testator, in another clause of his will, empowers his trustees to change the investments and reinvest as often as may be deemed proper, by making sales or otherwise, does not change the nature of the trust, which may extend beyond the time limited, and does not, therefore, extricate the case from the operation of the rule; the possibility of such continuance the law regards as decisive in determining the question of perpetuity or not." The rule of perpetuities as applied to trusts in *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88, has been approved also in *Stannard v. Barnum*, 51 Md. 449; *Heald v. Heald*, 56 Md. 309; *Collins v. Foley*, 63 Md. 162, 52 Am. Rep. 505; *Albert v. Albert*, 68 Md. 372, 12 Atl. 11; *Dulaney v. Middleton*, 72 Md. 78, 19 Atl. 146; *Thomas v. Gregg*, 76 Md. 174, 44 Atl. 418.

¹⁴³ But the contention, on the part of the appellants, is that this settled rule, this "landmark of the law," has no application to charitable trusts, and counsel ventured to assert that there is no case in Maryland in which it has been so applied. There are, however, at least two cases where the rule has been directly applied to such trusts. In the old and leading and very familiar case of *Dashiell v. Attorney General*, 5 Har. & J. 392, 9 Am. Dec. 572, the devise was for "poor children belonging to the congregation of St. Peter's Church, etc." The devise was held void because the trust was indefinite and because it created a perpetuity. The decision just cited was so construed in the case of *Needles v. Martin*, 33 Md. 618, where the devise for a charitable purpose was also held to be void because it was too vague as well as because it was a perpetuity. But ever since the case of *Dashiell v. Attorney General*, 5 Har. & J. 392, 9 Am. Dec. 572, it has been held in Maryland that the statute of 43 Elizabeth has never been in force in this state, and therefore there is no distinction here, as in many other states and in England, between a bequest to charitable uses and other objects: *Dashiell v. Attorney General*, 5 Har. & J. 392,

9 Am. Dec. 572; Provost etc. v. Abercrombie, 46 Md. 173; Yingling v. Miller, 77 Md. 107, 26 Atl. 491.

Hence it will be seen that in spite of the criticism of "the learned annotator" whose notes to *Barnum v. Barnum* are published in Perkins' edition, 26 Md. 119 [90 Am. Dec. 88], and were so much relied on at the hearing, we feel constrained to adhere to the law as announced in that case. It is apparent, however, that this course must tend to benefit, rather than injure, the prospects of charitable trusts in this state in the future, because testators, like all others, will be required to know and act upon the well-settled law of the state, and they will therefore give directly and absolutely to charitable trusts what they have to give for such purposes, and they will not appear to give freely with one hand while they hold on to their gifts with the other, and by means of trustees attempt to control property which they have parted with. In the recent case of *Pratt v. Trustees etc.*, 88 Md. 615, 42 Atl. 51, it is ¹⁴⁴ evident that the testator was well advised by counsel, and, as we held, avoided the error of creating a trust. He gave directly to the corporation itself. In the case just cited, in this court's opinion, recently delivered by the present chief judge, it was shown very clearly by reason and authority that no trust was or was intended to be created.

But if the contention of the appellant be correct, such a course was altogether unnecessary, for, as suggested by counsel for appellee, if the perpetuity rule does not apply to devises and bequests to religious and charitable uses, this court, in the case of Mr. Pratt's will, could have decided the question very easily by holding that whether there was a trust or not was immaterial, because if there was no trust the rule confessedly did not apply, and if there was a trust it did not apply because the devise was in favor of a charitable institution.

It follows from what we have said that we entirely agree with the view taken of this case by the learned court below.

Decree affirmed with costs.

THE RULE AGAINST PERPETUITIES IS, that no interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest: *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556.

PERPETUITIES.—THE ESTATE MUST VEST at all events within the time allowed, in order that the rule against perpetuities may not be offended: See the monographic note to *In re Walkerly*, 49 Am. St. Rep. 119-121; *Bigelow v. Cady*, 171 Ill. 229, 63 Am. St. Rep. 230, 48 N. E. 974.

CHARITIES.—THE RULE AGAINST PERPETUITIES does not apply to gifts for charitable uses: *Mills v. Davison*, 54 N. J. Eq. 659, 55 Am. St. Rep. 594, 35 Atl. 1072; *Lane v. Eaton*, 69 Minn. 141, 65 Am. St. Rep. 559, 71 N. W. 1031; monographic note to *In re Walkerly*, 49 Am. St. Rep. 127-129.

RYAN v. McLANE.

[91 Md. 175, 46 Atl. 340.]

PLEADING—EFFECT OF DEMURRER—ADMISSION OF WHAT.—In a suit for the specific enforcement of a contract, a demurrer to the complaint admits the existence of such contract, but not the construction placed thereon by the plaintiff.

SPECIFIC PERFORMANCE—PURCHASE OF CONTROLLING INTEREST IN CORPORATION—SELLERS ACTING FOR OTHER STOCKHOLDERS.—A contract for the purchase of the stock of a quasi public corporation, whose object is to gain the control of such corporation, where the sellers are a committee representing themselves and all other stockholders who join them by a certain date, and the contract contemplates a purchase of all the stock pooled, and shows on its face an intention to protect all the stockholders, and the purchaser knows that the sellers are acting for the benefit of all the stockholders, and that they have no authority to sell without the consent of the holders of three-fourths of the stock for whom they were acting, such contract cannot be specifically enforced against the sellers representing merely the stock which they held at the time the contract was made, since this would be inequitable and unreasonable.

SPECIFIC PERFORMANCE RESTS IN THE SOUND DISCRETION of a court of equity. It is a matter of grace and not of right, and will never be decreed where the equity of the case is not clear.

SPECIFIC PERFORMANCE—PURCHASE OF STOCK IN CORPORATION—PRIOR POOLING AGREEMENT—MUTUALITY.—Where a contract for the purchase of all the stock of a corporation which shall be pooled by a certain date is made with knowledge of and reference to a prior pooling agreement between the sellers and other stockholders to the effect that no stock should be sold without the concurrence of the holders of three-fourths of the stock held by the signers of the pooling agreement, the sellers being a committee representing the other stockholders, and where the purchaser makes a deposit with the committee which is to be forfeited in case he fails to accept and pay for all such pooled stock within forty days, such agreement is not an absolute contract of purchase and sale, but a mere offer or option, which cannot be specifically enforced for want of mutuality.

SPECIFIC PERFORMANCE—PURCHASE OF CORPORATE STOCK—PRIOR VOID POOLING AGREEMENT.—A contract for the purchase of corporate stock, made subject to the provisions of a prior pooling agreement, cannot be specifically enforced if such pooling agreement is declared void, as it would be inequitable to enforce it.

SPECIFIC PERFORMANCE—PURCHASE OF CORPORATE STOCK—PRIOR VALID POOLING AGREEMENT.—A contract for the purchase of corporate stock, made subject to the provisions of a prior pooling agreement which declares that no sale shall be made without the concurrence of the holders of three-fourths of the pooled stock, cannot be specifically enforced even if the pooling agreement is valid, where such contract of sale has never been concurred in by the holders of three-fourths of the pooled stock.

Bernard Carter and William L. Marbury, for the appellant.

William A. Fisher, John Prentiss Poe, and J. Southgate Lemmon, for the appellees.

178 FOWLER, J. The bill in this case was filed by Thomas F. Ryan, of New York, against Louis McLane and others for the specific performance of an alleged contract and for an injunction to restrain the defendants from parting with, transferring, or encumbering the possession of any certificates of stock held by them respectively of the Seaboard Company, a railroad company incorporated and existing under the laws of Virginia and North Carolina. Under powers granted by its charter this company operates not only its own line extending from Portsmouth, Virginia, to Weldon, North Carolina, with several branches connected therewith, but it also controls and operates eight other lines of railroad, the names and lengths and termini of which it is not necessary now to mention, but the bill alleges that by means of the ownership of its own chartered line, and the control of the other corporations just referred to, the Seaboard Company practically owns, controls, and operates a railroad nearly a thousand miles in length, extending from Norfolk to Atlanta, the total capital stock of which aggregate \$6,142,550, and the total bonded debts and rental charges amount to about \$16,712,000; while the gross earnings of the whole system for the fiscal year ending June 30, 1898, were officially reported to be \$4,011,554.32.

In the sixth paragraph of the bill it is alleged that on October 6, 1896, the plaintiff was a stockholder of the Seaboard Company, and had, as was well known to the defendants, entered into contracts to purchase a large amount of such stock; that on the day just mentioned he entered **179** into negotiations with three of the defendants, McLane, Robinson, and Watts, for the purchase of a large amount of the shares of stock of the Seaboard Company from the defendants just named, they then and there representing that they were personal stockholders in said company, and also as a committee representing a large amount

of stock in said corporation held by others; that the three defendants represented to the plaintiff that the stock in the Seaboard Company owned by themselves and the associated stockholders, for whom they were authorized to act, amounted to upward of 3,000 shares of the par value of \$100 each, and that they were desirous of making a sale of all such stock in said corporation, reserving also the right to include in such contract a sale of the shares of any stockholders of said Seaboard Company as should join with them and deposit their stock with said McLane, Robinson, and Watts prior to October 18, 1896. It was at the same time agreed between the plaintiff and the defendants just mentioned that the plaintiff was to pay \$125 per share for all the said stock owned by said defendants, as well as for that owned by the stockholders, who were then represented by said defendants, and also for the stock of other stockholders of said company, "who should agree to such contract of sale and deposit their stock for delivery to the plaintiff on or before October 18, 1896." It was further agreed as alleged that the plaintiff "should then and there pay the sum of \$60,000 earnest money upon such purchase of stock, the same to be forfeited as liquidated damages if the plaintiff should fail to receive, take, and pay for all the stock of the Seaboard Company in such contract of sale." It is alleged in the following paragraph—the seventh—that on the same day on which the above verbal agreement was made, the plaintiff and said McLane, Robinson, and Watts, in order to evidence such agreement and contract, entered into a written agreement, a copy of which is filed with and made part of the bill. Inasmuch as the whole object of this litigation appears to be to compel a specific performance of ¹⁸⁰ this written contract we will have to examine it carefully and for that purpose we will here transcribe it.

"Memorandum of understanding and agreement between Louis McLane, Moncure Robinson, and Legh R. Watts, committee, parties of the first part, and Thomas F. Ryan, in behalf of himself and associates, party of the second part.

"Whereas, the parties of the first part are stockholders in the Seaboard and Roanoke Railroad Company, and also represent a large amount of stock in said corporation held by others;

"And whereas the said committee, in behalf of themselves and associate stockholders, are desirous of making a sale of all their stock in said corporation, and also the shares of all such other stockholders as join with them prior to October 18, 1896;

"And whereas the party of the second part, in behalf of himself and associates, is willing and desirous to purchase all the

shares of stock held by said committee as the same may be pooled and deposited prior to said October 18, 1896, on the terms and conditions and for the price hereinafter stated.

"Therefore, to carry out such intended purchase of said stock the parties agree together as follows:

"1. The price which is to be paid for all such pool stock of the Seaboard and Roanoke Railroad Company is one hundred and twenty-five dollars per share.

"2. The committee is to declare the amount of all stock deposited with the said pool and embraced in this contract of sale on October 18, 1896.

"3. The party of the second part makes this contract to purchase relying on the representation that the railroad companies comprising the Seaboard Air Line system are free of all floating debt due to any creditor other than some company in that system. Said party of the second part is to have forty days from this date within which to have an examination made into the condition and accounts of said corporation and system, and to determine whether said representation is correct.

¹⁸¹ "4. The party of the second part now deposits sixty thousand dollars cash with the committee, and agrees that that sum shall be forfeited and paid as liquidated damages in case he and his associates fail, at the expiration of said forty days, to accept, take over, and fully pay in cash for all such pool stock, at the price of one hundred and twenty-five dollars for each and every share thereof. If such liquidated damages are so forfeited by the second party, said sum shall be paid over by the said committee to the railroad company and distributed as a dividend among all the holders of common stock. At the expiration of said forty days the party of the second part agrees to purchase and take over from such committee not to exceed one hundred and seventy-five shares of the stock of the Baltimore Steam Packet Company and to pay therefor the sum of fifteen hundred dollars cash for each share.

"5. Simultaneously with the closing of said option by the party of the second part, and the payment in cash for all such pool stock of the Seaboard and Roanoke Railroad Company, less the sixty thousand dollars deposited with the execution of this contract, which is to be treated in that event as a part of the purchase money, and also to pay in cash for the shares of the Baltimore Steam Packet Company above specified, the committee are to provide, if requested by the second party, the resignation of the president and directors of the Seaboard and Roanoke Railroad Company and of their controlled corporations

and the Baltimore Steam Packet Company and procure the nominees of the party of the second part to be elected in their places, so as to give control of said corporation to said second party.

"Witness the following signatures and seals to this memorandum of agreement, which is executed in triplicate this sixth day of October, A. D. 1896.

"LOUIS McLANE.

"MONCURE ROBINSON.

"LEGH R. WATTS.

"THOMAS F. RYAN."

¹⁸² Subsequent to the filing of the bill the plaintiff filed several exhibits in addition to the above agreement, consisting of records of two suits in equity, both brought by him, one in the circuit court of the United States for the district of Maryland on the 11th of May, 1897, against McLane, Watts, and the executors of Robinson, and the other in the circuit court for the eastern district of Virginia on 2d of October, 1897, against the Seaboard and Roanoke Railroad Company and others. We shall have occasion to refer to some of these exhibits presently.

In the seventh paragraph of the bill the plaintiff further alleges that, in part performance of said written agreement, he paid to the said committee \$60,000 in cash as part of the purchase money for said stock, and that under said written agreement, as construed by him, he agreed and bound himself to purchase, accept, and pay \$125 per share for all the shares of stock held by others than the said committee and their associates who should, prior to October 18, 1896, join in said contract of sale on the terms and conditions therein stated, and should deposit their stock with said committee, and that the latter thereby bound themselves to declare on October 18, 1896, the amount of all stock deposited with them and embraced in such contract of sale. It is further alleged that said committee represented that the shares of stock owned by them and those then associated and represented by them in said contract amounted to over 3,000 shares, but that they refused to give any information as to the amount of stock held by them and their associates respectively; that said committee did not inform the plaintiff that any stockholders of said company not associated with them prior to October 6, 1896, had elected to join with said committee in the said contract of sale or to deposit their stock before October 18, 1896, and the plaintiff therefore avers that

said committee had not prior to that date received any deposit of stock which he was bound to take, except the stock of said committee owned and held by them individually, and the stock of ¹⁸³ those actually associated with them on October 6, 1896; it is also alleged that the certificates of the stock the plaintiff was bound to take had been deposited with the defendant McLane and were in his possession in Baltimore, Maryland, at the time of filing of the bill; that the plaintiff has offered to take and pay for all the stock covered by said contract, but that said committee refused to deliver the same.

In the fourteenth paragraph of the bill, it is alleged that the refusal of the committee to deliver the stock claimed by the plaintiff was based upon the terms of the contract or pooling agreement between themselves and other stockholders, dated October 2, 1896, under which said stock had been deposited with them, which contained a provision that no sale should be made without the concurrence of the holders of three-fourths of the stock held by all the signers of the pooling agreement, without reference to the question as to whether it had actually been deposited or not prior to the date mentioned. By the terms of the pooling agreement just referred to, dated the 2d of October, 1896—four days before the execution of the contract here sought to be enforced—it was for their mutual protection agreed between the stockholders of said company who should sign it, that for the period of five years from the date of said agreement, or until thirty days after it was abrogated by the written assent of the parties thereto holding three-fourths of the said stock, none of said stock should be sold or transferred for voting purposes unless with the written concurrence of the same number of such stockholders as were authorized to abrogate said agreement. The plaintiff further alleges that, being advised that the pooling agreement was void as against public policy and for other reasons, he instituted suits in the circuit courts of the United States for the district of Maryland and the eastern district of Virginia to have said agreement set aside, so that the defendants might be without excuse for their refusal to carry out their contract of sale.

¹⁸⁴ But a few days before the hearing in the court below the plaintiff amended his bill by adding several additional paragraphs, the most important of which and the one most relied upon by the plaintiff is paragraph 14a. We shall have occasion to refer to this amendment more particularly hereafter. It is sufficient to say that the pooling agreement, so far as is dis-

closed by the bill in this case, has never been set aside either by the concurrence of the parties thereto or by the decree of any court.

We have thus stated so much of the very elaborate bill as we think is necessary to a discussion of the controlling questions presented by this appeal.

The defendants demurred to the whole bill as amended upon the grounds: 1. That it is without equity; 2. That the court is without jurisdiction to grant the relief prayed. The court below passed a decree sustaining the demurrer, dismissing the bill, and dissolving the injunction. From this decree the plaintiff has appealed.

Although the discussion at the hearing took a wide range, and the arguments of the distinguished counsel for both plaintiff and defendants were characterized, if possible, by more than their usual ability and research, yet, after all, the plaintiff's case must rest upon the contract alleged to have been made by him with the defendants. A good deal was said as to the effect of the demurrer in this case, that is to say, how far and in what sense it admits the allegations of the bill. It is sufficient to say that the demurrer does not admit the construction the plaintiff has, in his bill, placed upon the alleged contract of sale to be correct, nor the correctness of the construction he has placed upon the pooling agreement, on which the defendants rely to justify their refusal to consummate the agreement relied on by the plaintiff. In other words, the demurrer admits that there were such contracts as are set out in the exhibits, and raises the question as to their true construction. It follows, therefore, that our principal duty in this case, waiving the question of jurisdiction, will be to ascertain what is the true ¹⁸⁵ meaning of the contract of October 2, 1896, in the light of the traversable averments of fact not contradicted or shown to be untrue in one or other of the exhibits filed by the plaintiff.

But before considering this controlling question, it may be proper to pause for a moment to inquire more particularly as to what is the case presented to us by this bill. It is simply this: The plaintiff comes into a court of equity asking for the specific performance of a contract which upon its face shows that, so far as the parties to it were concerned, it was entered into for the purpose of enabling him to get control of this great corporation. He was to become the owner of stock, according to his construction, of just enough stock to make him master of the situation, so that upon his request those who had been placed

in authority by the stockholders were to resign and place him in control, not only of the Seaboard Air Line, but of the eight other corporations connected with and operated by it. But whatever may be the construction of this contract by the plaintiff, it also appears upon its face that the intention of the committee was to make terms in relation to, and were desirous of making a sale of, not only their own stock, but as well that of their associates and the stock of all such other stockholders as should join with them prior to October 18, 1896. We say this is apparent from the contract itself. Such a course was, without regard to the pooling agreement, demanded by the plainest dictates of ordinary fair dealing. In short, the course which the plaintiff is here contending the defendants are bound to pursue would have resulted in selling their own stock, and at the same time in selling out the minority stockholders. While we do not wish to be understood as saying that never, under any circumstances, will a court of equity enforce a contract for the purchase of a controlling interest in a corporation, yet we are clearly of opinion that this contract, showing as it does upon its face an evident intention on the part of the committee to protect all the stockholders who should join in the pool before ¹⁸⁹⁶ October 18, 1896, should not be enforced by a court of equity in such manner as to prevent the carrying out of that intention. It may be that the position of the plaintiff in this respect may be legal, but it is certainly far from equitable. He relies upon the provision in the contract that he was to take and pay for only such shares of stock as were both pooled and deposited before the 18th of October, 1896, while he must have known, from the face of the contract itself, that the object of the committee was to sell, not only their own stock, and the stock of those who had joined the pool on October 6th, but also all the stock of other stockholders who should join before the 18th of that month. This is shown, as we have said, not only by the contract itself, but also by the circular letter signed by R. C. Hoffman, dated October 7, 1896, the day after the execution of the alleged contract of sale. This letter, or a copy of it, was filed by the plaintiff with his bill in the circuit court of the eastern district of Virginia, and that bill alleges that it was sent to all the stockholders of the Seaboard Company, of whom he was one. It informs them and informed him that the pool is for the benefit of all, and requests them all to join on or before the 18th of October. It is sufficient for the purposes of the aspect of the case we are now discussing that, whatever may have been the plain-

tiff's views in regard to his legal rights, he was fully informed, and must be held to have known from the very beginning of negotiations at Norfolk, of the equitable ground upon which the defendants were standing. Although it may not be proper to take, as admitted by the demurrer, the allegations of the sworn answers of Messrs. McLane and Watts to the bill filed by the plaintiff in the United States circuit court for the district of Maryland, and filed as exhibits with the bill in this case, yet we cannot shut our eyes to the facts therein alleged, namely, that before and at the time the alleged contract of sale was made, the plaintiff and his attorney were in possession of full knowledge that the committee was acting for all the stockholders who should join the pool before October ¹⁸⁷ 18th, and not, as he now contends, for only those who had joined and deposited their stock before that date. What must be the answer of a court of equity to a plaintiff who asks it to exercise its sound judicial discretion in the specific performance of a contract, which has for its main object the placing of this great corporation in his control or in the control of himself and his undisclosed associates? It seems very clear to us that it is no part of the duty of such a court to grant any relief under such circumstances as confront us under the allegations of this bill and the exhibits filed with it. The only case, so far as we have been informed, where a plaintiff has appealed to a court of equity to specifically enforce a contract for the purchase of stock for the purpose of getting control of a corporation is the case of Foll's Appeal, 91 Pa. St. 436, 36 Am. Rep. 671. The bill in the case just referred to was filed to compel the specific performance of a contract for the sale and delivery of stock of a national bank for the purpose of controlling it. We quote from the opinion just cited: "This case presents some extraordinary features. We have nothing like it in this state since equity powers were conferred upon the courts. . . . The avowed object of the purchase of the stock and the filing of this bill was to get control of the bank for Greer and his friends. This appears upon the face of the bill, and is the main ground upon which equitable relief is asked. . . . While the legal right of the plaintiff to buy up sufficient of the stock of this bank to control it, in the interest of himself and friends, may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a quasi public institution. While it is the property of its stockholders and its profits inure to their benefit, it is nevertheless intended by the law creating it that it should be for the

public accommodation. . . . The stock, as now held, is scattered among a variety of people and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors, who use it for the safekeeping ¹⁸⁸ of their money, or the business public, who look to it for accommodation, . . . are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends can control it. . . . Were we to affirm this decree I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock-jobbing operations. . . . The decree of a chancellor is the exercise of a sound discretion; it is of grace, not of right, and will never be made where the equity and justice of a case is not clear." In this connection the plaintiff relied upon *Barnes v. Brown*, 80 N. Y. 527, and *Cook on Corporations*, section 622, which is based upon the case just cited, for the proposition that a contract by which directors who own a majority of the stock agree to sell it and substitute the vendees as directors of the company is not illegal. But the situation here is quite different, for neither the vendors nor the vendee had a majority, and therefore it is clear, and it was so contended by the plaintiff's counsel, that the object of the contract was to give him the majority by uniting his holdings to those of the defendants. In addition to this, it may be observed that we may concede for the purpose of the argument of this branch of the case that the alleged contract is not illegal. But it does not follow that because it is not illegal it is equitable and should be enforced by a court of equity. As was said by the supreme court of Pennsylvania in *Foll's Appeal*, 91 Pa. St. 436, 36 Am. Rep. 671, if parties were able to obtain control by purchase, it cannot be helped, but here is a quasi public corporation in which the minority stockholders and the public are to be considered. If the plaintiff has any legal rights, let him enforce them in a court of law. What we have said cannot, of course, be taken to indicate that we are of opinion that there may not be many cases in which a court of equity will specifically enforce contracts for the sale of railway or other shares. It is said in section 338 of *Cook on Stockholders*: "If the stock contracted to be sold is easily obtainable in the market, and there are no ¹⁸⁹ particular reasons why a vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertained, or the stock is not to be readily obtained

elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted for to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock": *Gottschalk v. Stein*, 69 Md. 51, 13 Atl. 625. This is a sufficient statement of the general rule. But, of course, if it be true, as we have pointed out, that the cause or reason why the plaintiff here demands the stock is not equitable, and therefore not reasonable, the court will not decree specific performance, although the value of the stock is difficult to ascertain and cannot be obtained elsewhere. But in this case, however difficult it may be to obtain the stock elsewhere, it is not difficult to ascertain its value, for in the bill filed in United States circuit court by the plaintiff he alleges that its value is \$100 per share.

2. But assuming that the contract is not illegal, let us examine it and ascertain, if we can, its true meaning.

We have already seen what this contract is—and we have also said how far and in what sense the demurrer admits the allegations of the bill. The bill alleges that before the agreement was made, and while negotiations were pending, the defendants, McLane, Robinson, and Watts, informed him they were acting as a "committee representing a large amount of stock in said corporation held by others." In view of the fact that the plaintiff studiously refrains from alleging his want of knowledge of the existence of the pooling agreement before and at the time he entered into the contract of October 6th, and remembering that the contract is made by the defendants as a committee in behalf of themselves and associate stockholders, and in behalf of all stockholders who should join with them before a certain date, and that the plaintiff declared that he was willing and desirous to purchase all the shares of stock held by said committee, as the same may be pooled and deposited prior to the ¹⁹⁰ date mentioned, the construction now placed upon the contract by the plaintiff, absolutely abrogating, as it does, the pooling agreement, is, to say the least, not a reasonable one.

If this pooling agreement was, as contended, so destroyed on the 6th of October, why should the defendants, constituting the committee, on the next day, send circulars to all the stockholders to join in the pool? But in addition to this, the date named in the circulars, the 18th of October, 1896, is the very day named in the contract on or before which the stock the plaintiff was willing to purchase was to be pooled and deposited. It is unnecessary, however, further to discuss this question, for the counsel

of the plaintiff practically conceded that the plaintiff was fully aware on October 6th of the existence of the pooling agreement of October 2d. But whether he was in fact fully informed of the existence and terms of the pooling agreement, he has never denied the possession of such knowledge, in spite of the fact that such a denial and the proof of its truth, form the very foundation of his case. For it is obvious that if it be once conceded that both parties knew of the existence of the pooling agreement, it must follow that they contracted with reference and subject to its provisions—unless it be null and void as alleged in the bill. We will presently discuss the effect of the nullity of the pooling agreement. If, then, we are to consider the pooling agreement as an element in this case, it seems to us that the contention of the plaintiff, though supported with great force and ingenuity, must fall to the ground. For instead of being, as contended by the plaintiffs, a completed contract for the sale of stock, it was but “a pending offer” “or an option,” which must, according to the pooling agreement, be ratified by stockholders holding three-fourths of the Seaboard Company’s stock, and accepted by the plaintiff. Now what are the broad features of the contract which challenge attention? 1. That the contract on the one side is made by a committee already existing, previously created; 2. That ¹⁹¹ all the stock of all the stockholders who should join the pool before the 18th of October was the subject of negotiations; 3. That the contract looked to an “intended purchase” and not an actual sale; 4. That neither the vendors nor the vendees are disclosed—the former being represented by the committee—and the latter acting by and through the plaintiff.

At the very beginning of the so-called contract it appears that the parties thereto are the committee and Thomas F. Ryan on behalf of himself and associates, and that the stock which the committee was desirous of selling was all the stock in the pool. When we look to the allegations of the bill in the sixth paragraph in reference to the negotiations there referred to, and the failure of the plaintiff to deny knowledge of the pooling agreement, which of itself under the facts in this case is equivalent to an admission of knowledge, can it be doubted that the plaintiff made the so-called contract of sale subject to the previous contract? If so, the second contract was, and must have been, in the nature of an offer or option. It seems to us perfectly clear that the parties themselves directly and pointedly refer to and recognize the existence of the pooling agreement in the second

article, in which there is a clear distinction drawn between the contract and the pooling agreement: "2. The committee is to declare the amount of all stock deposited with the said pool and embraced in this contract of sale on October 18, 1896." Of course the said pool must refer to, can have no other reference than to, the pool formed by the pooling agreement, and the contract of sale, it is equally clear, must refer to the intended purchase, which the paper was executed to carry out. But when we examine the subsequent part of the paper we find that the parties themselves give it its proper character—for in the fifth paragraph the language used is: "Simultaneously with the closing of the said option by the party of the second part," and the performance of certain other things, the committee were, if requested by the plaintiff, to provide for the resignation ¹⁹² of president and directors of the Seaboard Company and its controlled corporations. We think there can be no question that the words here used relate to the contract now relied on by the plaintiff as a complete and absolute contract of sale which he comes into a court of equity to have specifically performed. In addition to this, however, the record shows in his bill, filed in 1897, in the eastern district of Virginia, one of the exhibits filed with the bill in this case, that the plaintiff himself called his absolute contract only "a pending offer." And in the bill filed in the circuit court of the United States he again speaks of the contract of sale as "an option." But it also appears that the plaintiff on his part agrees to do nothing until in the fourth paragraph he "agrees" that the sum of \$60,000 which he deposits with the committee shall be forfeited and paid as liquidated damages in case he and his associates (whoever they may be) fail, at the expiration of forty days "to accept," take, and pay for all such pool stock as agreed. Under the circumstances as disclosed by the bill, what better arrangement could the plaintiff make? He was trying to get enough, just enough, stock to control. He had other options or negotiations outstanding, and if he found there would be stock enough in the pool, added to what he had or had secured, to give him control, he would accept—otherwise he would not accept, but would forfeit the deposit of \$60,000. It seems to us that this is what the contract means. He and his associates were willing, therefore, to risk the loss of a part of the \$60,000 (for he would get back part of it as a stockholder) in the hopes of gaining what they had been striving for, namely, the control of the Seaboard Company and the other corporations operated by it. From what we have said, it

will be seen that we are of opinion that the contract relied on by the plaintiff is not an absolute contract of purchase and sale, but it is a mere "pending offer," as he called it, or "an option," as it is called by the parties themselves in the paper itself. If this be so, of course, it requires neither authority nor reasoning ¹⁹³ to show that equity will not enforce such a contract—for both must be bound to give either a standing in a court of equity: Fry on Specific Performance, secs. 114-148, 440; Pomeroy on Specific Performance, 162-166; Gelston v. Sigmund, 27 Md. 344; Duval v. Myers, 2 Md. Ch. 405; King v. Warfield, 67 Md. 249, 1 Am. St. Rep. 384, 9 Atl. 539; O'Brien v. Pentz, 48 Md. 577; Bamberger v. Johnson, 86 Md. 41, 37 Atl. 900; Horner v. Woodland, 88 Md. 511, 41 Atl. 1079.

3. Much reliance was placed upon the supposed consequences of the admissions claimed to have resulted by the demurrer to the allegations contained in paragraph 14a, which is an amendment to the original bill. This amendment appears to have been made for the purpose of getting rid of the pooling agreement, and it was contended with much earnestness that the plaintiff having averred therein: 1. That none of the parties to the contract of October 6th made it with reference to or in connection with the pooling agreement; and 2. That all the then parties who signed said pooling agreement had fully authorized the committee to make the contract of sale—that unless we dispense altogether with the rule that facts which are averred are to be taken as true on demurrer, it is impossible to come to any other conclusion than that the contract of sale of October 6th was not made with reference to, or in connection with, the pooling agreement. But this position gives a conclusiveness to the supposed admissions resulting from the demurrer to the allegations in respect to the construction of the plaintiff, placed by him upon the two agreements here involved, that cannot be properly conceded to them. For, after all, the true construction of the contracts, and not the construction placed upon them by the plaintiff, must govern the rights of the parties. It is apparent from what we have already said that, as we construe the contract, the whole negotiation between the plaintiff and defendant was made subject to the pooling agreement, and that the same fact is apparent from the face of the contract of sale itself. We think it equally clear that according to the plain construction ¹⁹⁴ of the pooling agreement the parties who then, that is, on October 6th, are alleged in the bill to have held 3,000 shares, could not have authorized the committee to make the contract

of sale as construed by the plaintiff, for by the very terms of the pooling agreement three-fourths of the stock pooled before the 18th of October were required to authorize a sale, that is to say, more than 6,000 shares were required to authorize the committee to make the sale, or double the amount of stock held by those alleged to have given such authority, for it appears that there were some 8,500 shares pooled before the date mentioned.

In conclusion, a few words in regard to the alleged nullity or invalidity of the pooling contract. It appears to be clear that whether this contract be valid or not is immaterial in this case. We have in the former part of this opinion arrived at the conclusion that the two contracts, the pooling agreement and the so-called contract of sale, are so connected, the latter having been made subject to the provisions of the former, that it would seem necessarily to follow if the former be declared void, it would be inequitable to enforce the latter; and if the former be held to be a valid and binding contract the sale claimed by the plaintiff to have been made to him, never having been concurred in by those holding three-fourths of the pooled stock, such alleged sale is no sale and cannot be enforced.

There are other grounds on which the defendants relied, which were ably discussed and sustained by the citation of numerous authorities; but we think what we have said is sufficient to justify the conclusions we have reached.

Decree affirmed, with costs to defendants above and below.

SPECIFIC PERFORMANCE IS NOT A MATTER OF RIGHT in either party, but rests in the sound discretion of the court: *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788.

SPECIFIC PERFORMANCE OF A CONTRACT TO CONVEY STOCK will be decreed if it cannot be obtained elsewhere than from the respondent and its value is uncertain and not easily ascertainable: *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998; or if there has been a betrayal of confidence: *Steinmeyer v. Siebert*, 190 Pa. St. 471, 70 Am. St. Rep. 641, 42 Atl. 880. A contract for the sale of nearly all the bonds and stock of a corporation with an agreement that the vendor shall pay the interest and floating corporate debt, and use his best endeavors to secure the vendee the remaining stock and bonds at the lowest possible price, does not lack mutuality and may be specifically enforced: *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

WINGERT v. ZEIGLER.

[91 Md. 318, 46 Atl. 1074.]

INTERNAL REVENUE ACT—FAILURE TO STAMP ASSIGNMENT OF MORTGAGE.—An assignment of a mortgage, from which the proper revenue stamps have been inadvertently omitted at the time it was made, is not thereby rendered void under the internal revenue act, which provides that such instruments shall be invalid and of no effect if the person who transfers them has omitted to stamp them with intent to evade the provisions of the act, since such provision applies only to those instruments on which stamps have been omitted with intent to evade the law, and does not relate to an innocent failure to stamp an instrument.

INTERNAL REVENUE ACT—FAILURE TO STAMP INSTRUMENT—EFFECT OF SUBSEQUENT STAMPING.—Under the internal revenue act, the record of the assignment of a mortgage is not void by reason of not being stamped, but is only prohibited from being used in evidence before it is stamped, and when that is done by the collector, upon being satisfied that the stamp was omitted through inadvertence and not willfully, and the clerk has noted that fact upon the original record as authorized by the act, the right to use the assignment is restored, and relates back to the time it was made, subject only to rights acquired in good faith in the meantime, and consequently a sale under such assignment is valid and enforceable.

STATUTES—CURATIVE—VALIDITY.—THE LEGISLATURE has power to pass a curative statute to correct errors in deeds, mortgages, and other instruments, defectively executed or acknowledged, where the rights of third parties which have been acquired in good faith are saved.

Henry F. Wingert, for the appellant.

Alexander Neill, for the appellee.

319 **BOYD, J.** On the 14th of November, 1899, a mortgage was assigned to the appellant, Henry F. Wingert, who advertised the property, under a power of sale contained in the mortgage, and on December 12, 1899, sold it to Laura K. Zeigler, the appellee. The sale was duly reported to the circuit court for Washington county, and exceptions were filed by the purchaser on the ground that at the time of the sale the assignment of the mortgage was not stamped, as required by the United States revenue laws. On the 12th of January, 1900, the collector of internal revenue for the district of Maryland certified that, satisfactory evidence having been furnished him that the failure to affix and cancel stamps to denote the tax due at the time of the assignment was owing to inadvertence and was not willful, stamps of the proper value had been affixed and canceled by him, which certificate was noted on the original record by the clerk.

The court below set the sale aside, and from that action this appeal was taken.

A question of importance, and one concerning which the courts differed in passing on former internal revenue laws of the United States, was referred to at the argument—that is, how far Congress has the power to declare invalid transfers of property, made in accordance with state laws, by reason of the fact that the instruments used in making such transfers were not stamped as required by the revenue laws of the United States. That has never been determined by this court, and we do not deem it necessary to do so now, ³²⁰ but we only refer to it in order that it may not be understood by what we hereinafter say in reference to the statute before us, as intending to concede that such power is vested in Congress under the constitution of the United States. It will be time enough to pass on it when it becomes necessary, if that shall ever occur, and we do not now mean to intimate any opinion on the subject. Section 13 of the act of Congress, approved June 13, 1898, entitled, “An act to provide ways and means to meet war expenditures and for other purposes,” provides: “That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect,” etc. This is followed by some important provisions for the correction of failure to stamp which will be referred to later on in this opinion, and will not now be stated.

Schedule A includes assignments of mortgages and, as we have seen, this assignment was duly stamped by the collector within twelve months and his certificate was recorded by the clerk. None of the facts are disputed, and the only question therefore to be determined is whether the subsequent action of the collector in stamping the assignment so corrected the effect of the omission to stamp it when made, as to entitle the holder of the mortgage to have the sale ratified. No other objection

to the validity of the sale is suggested, and it is not shown or even claimed that ³²¹ the fact that the assignment was not originally stamped in any way affected the price which the property brought—indeed, that could not well have been attempted, as no one but the purchaser has objected to the sale. Nor is it suggested that the rights of any other person have in any way intervened, and the real purpose of our inquiry must be whether the appellee would by the ratification of this sale acquire such title as she would have had if the assignment had been duly stamped when made.

In order to ascertain the scope of the act and the effect of the failure to stamp an instrument included in it, such as the one before us, it will be necessary to examine carefully, and somewhat critically, the provisions of the statute. The only language used in it which in terms might seem to indicate the intention of Congress to wholly invalidate an instrument not stamped as required is the concluding clause of the portion of section 13 quoted above, which, after providing for the penalty, says: "And such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect." That language of itself is undoubtedly open to the construction that it was intended by Congress to declare an instrument embraced by the law invalid and of no effect unless it is stamped—at least until it is properly stamped—but in the connection in which it is used there is another interpretation which can readily be given it, which is far more consonant with justice and the evident purpose of the law. It says "such" instrument, etc., and when we look to see what "such" refers to, we find it is an instrument that the person whose duty it was to stamp it has left unstamped "with intent to evade the provisions of this act." It is scarcely possible that Congress intended that one who deliberately and intentionally violated the law might escape by paying "a fine not exceeding fifty dollars," while one who was perfectly innocent of so doing should have his title deed or other valuable paper declared invalid and of no effect. Under the statute it is the duty of the grantor in the deed, or the party issuing, ³²² selling, or transferring the instrument, document, or other paper to affix the stamp, and, if the construction contended for be followed, a designing grantor, taking the chances of a prosecution, might impose on an innocent purchaser whose title would be worthless, although he was absolutely free from any suspicion of wrongdoing or intention of evading the law. We cannot reach the conclusion that such was the inten-

tion of Congress when we find the law itself to be so suggestive of the other interpretation. In *Green v. Holway*, 101 Mass. 243, 3 Am. Rep. 339, Justice Gray reviewed the various acts of Congress on this subject, and cited authorities to show that the provision, "and such instrument, document, or paper shall be deemed invalid and of no effect," required a reference to the previous provisions in the section, to ascertain the meaning of the word "such," holding that it only applied to those on which stamps had been omitted with intent to evade the provisions of the law. The agreement sued on in that case was executed after the act of 1866 took effect, which used the same language as that in the act of 1898—"and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect." The court considered the effect of the insertion of the words "not being stamped according to law," and held that it did not change the meaning of the provision embodied in previous laws, when taken in connection with the other provisions. In *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499, that case was expressly affirmed. In *Black v. Woodrow*, 39 Md. 194, this court held that an instrument subject to the act of 1866 was not void or inadmissible in evidence, if the omission to stamp it was without intent to evade the provisions of the act. Many other authorities might be cited, including decisions of the supreme court of the United States, to show that in regard to some of the earlier acts of Congress such was the interpretation, and we think this provision in the present law should be so construed, and that it was intended to apply only to those cases where the stamp was omitted to evade the provisions of the law.

323 But if it had been conceded that the law should be construed to declare any instrument invalid and of no effect so long as it is not stamped, although omitted innocently, there are other provisions in the statute which conclusively show that when one is stamped, under such circumstances as this assignment was, the error is corrected and, excepting as to the rights of others acquired in good faith before such subsequent stamping, the instrument is to be treated as if it had been originally stamped according to law. Section 13, after stating what we have quoted above, provides that in all cases when the stamp is not affixed on certain instruments mentioned, any party having an interest therein can appear before the collector, who shall, upon payment of the price of the proper stamp and of the penalties prescribed, affix the stamp "and the same shall thereupon

be deemed and held to be as valid to all intents and purposes as if stamped when made or issued." It then further provides that when it shall appear to the collector, to his satisfaction, that an instrument was not duly stamped "by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof," then, if the instrument, or a properly proven copy thereof, "shall, within twelve calendar months after the making or issuing thereof," be taken to the collector and the stamp tax paid, he can remit the penalty and cause the instrument to be stamped. And when it is so stamped the officer having charge of the record is authorized to make a new record thereof, "or to note upon the original record the fact that the error or omission in the stamping of said original instrument has been corrected pursuant to law"—thus conclusively showing that it was not intended to make the record of every unstamped instrument null and void, for, if it was, the act would unquestionably have required a new record and would not have authorized the correction of the original one, made contrary to law. But it does not stop there, for it adds, "and the original instrument, or such certified copy or ³²⁴ the record thereof, may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped." If Congress had intended to give it effect only from the time it was legally stamped, surely such language would not have been used as that just quoted, for it would have been clearer and simpler to have said that it should only be valid from and after the time it was so stamped, if such was the intention. If that had been done, it might in some cases have worked great injustice. For example, under our state law a mortgage must be recorded within six months from its date, unless authorized by an order of court to be recorded after that time. If, more than six months after one is recorded, it is ascertained that, through some mistake or inadvertence, it was not properly stamped and the mortgagee then complies with the provisions of section 13, has it stamped by the collector within twelve months, and that fact noted on the original record by the clerk, must it be said that the original record was invalid because the mortgage was not then stamped? If so, then, although the United States has been satisfied and the laws of the state complied with, the mortgagee can have no benefit of the mortgage without the aid of a court of equity, and then only under the conditions prescribed by section 33 of article 16 of the code. We do not think

such a construction of the statute necessary to enable the government to enforce collection of the tax or within the intention of Congress as gathered from the law itself. It may well happen that an honest mistake may be made—especially by laymen—as to what tax is required. The courts of this country differed widely as to some of the requirements of the former revenue laws, and doubtless there will be differences as to the present law between judges, lawyers, and officers of the government whose duty it is to enforce it.

But there is still another provision in this section which greatly strengthens the contention of the appellant, and that is the last one. After providing for methods of correcting the omission to stamp instruments, etc., this section ³²⁵ concludes: "But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid." It is difficult to understand why Congress should have inserted that saving clause if it did not intend that the subsequent stamping should have a retroactive effect. If the law means that the instrument only becomes valid and operative from and after the time it is stamped, what possible use was there in making the reservation in favor of rights acquired before stamping? Was it not manifestly inserted because Congress understood that the previous provisions of the section might give such effect to an instrument, subsequently stamped, as it would have had if originally stamped, even against the rights acquired in good faith, unless that reservation was inserted?

It may be well to add that sections 14 and 15 of the act of 1898 do not strengthen the appellee's contention, but, if they affect it at all, rather weaken it. They do not contain provisions that are new to the internal revenue laws. The first part of section 3421 of the United States Revised Statutes (1875) virtually corresponds with section 14, and it includes the provision of section 15, prohibiting the recording of instruments, etc., unless they are stamped, but there is this marked difference between them. The law as codified in that section (3421) provided that the record of an instrument not properly stamped "shall be utterly void and shall not be used in evidence," while section 15 of the present law only says it "shall not be used in evidence"—the inference being that the change was made purposely to exclude the provision as to its being void. This statute, it is true, prohibits the record of an instrument not properly stamped,

and anyone violating it is liable to the penalty imposed, but it does not in terms make a record void, and we do not think that the intention to do so can be gathered from it.

It is said, however, on behalf of the appellee, that it is not contended that the instrument is absolutely void, but ³²⁶ that the statute prohibits the use of it until it is stamped, and hence that, inasmuch as this assignment was not stamped until after the sale, it was of no effect and the appellant was without authority to sell under the power in the mortgage when the sale was made. But that argument avoids the main question in the case and proceeds on the theory that the instrument is of no use excepting from the time it is stamped, and has no retroactive effect. When the sale was ready for ratification and the court was called upon to act upon it, there was no legal obstacle in the way of using the assignment in evidence to ascertain the authority of the appellant to sell. Independent of the act of Congress the authority was vested in him when he made the sale, as he had complied with the requirements of the laws of this state, and under that act he had done what, by its very terms, enabled him to use it in the court below "in the same manner and with like effect" as if it had been originally stamped—that is, as if it had been stamped when made—subject only to the qualification that no right had been acquired in good faith before the stamping. It is not pretended that any such right had been acquired, hence we must give the assignment the "like effect" it would have had if it had been stamped when made. We have in this state many instances of similar legislation in what are called "curative statutes" to correct errors in deeds, mortgages, etc., defectively executed or acknowledged. Without multiplying examples see sections 78 to 82, inclusive, of article 21 of the code for a number of them. They save the rights of third parties which have been acquired in good faith, and the power to pass such laws has been sustained over and over again by this court and its predecessors. The principal difference between that class of legislation and this act of Congress is that the latter authorizes the defect to be cured by the same statute that creates the disability, if the methods prescribed for that purpose are pursued, while the former corrects the error by subsequent statutes.

³²⁷ We are of the opinion, then, that the record of this assignment of the mortgage was not void by reason of not being stamped, but, at most, was only prohibited from being used in evidence before it was stamped, and when that was done by the

collector, upon being satisfied that the stamp was omitted through inadvertence and not willfully, and the clerk noted that fact upon the original record as authorized by the act, the right to use the assignment, as if it had been stamped when it should have been, was restored and related back to the time it was made, subject only to any rights in it or the property secured by the mortgage bona fide acquired in the meantime. Inasmuch as no such rights are alleged to have been so acquired, we will not discuss the effect and extent of that provision beyond what we have said. Although the cases which were decided by this court under previous laws are not wholly applicable, several of them do reflect upon the retroactive effect of such subsequent stamping. In *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618, the suit was brought on an agreement which was not stamped until the day of trial—over two years after it was made. The court held that its validity was restored by payment of the penalty and stamp tax, and it was admissible in evidence, although not stamped until after the suit was brought. In *Carson v. Phelps*, 40 Md. 73, Carson, on the 27th of April, 1868, executed a deed purporting to convey to himself, as trustee, some lots of ground in trust for the purposes therein named, but did not stamp it. He died insolvent in May, 1869, and a creditor's bill was filed against the property included in the deed of trust, and the parties interested in that deed paid the stamp tax and penalty to the collector on the 11th of July, 1870. This court held that the defect of a want of stamp had been supplied by the affixing of the stamp and the payment of the penalty to the collector, and the deed was sustained as a priority over the general creditors, who were such prior to its execution. Other cases might be cited to show that the result of many decisions has been to give the subsequent stamping of instruments under the United States revenue laws a retroactive effect, but we will not prolong this opinion by doing so. The decree of the court below will be reversed and the cause remanded in order that the sale may be ratified.

Decree reversed and cause remanded, the appellee to pay the costs.

REVENUE STAMP.—THE OMISSION, without fraudulent intent, to stamp a chattel mortgage as required by the United States internal revenue act does not affect its validity: *Moore v. Quirk*, 105 Mass. 49, 7 Am. Rep. 499. So an unstamped deed of real estate is valid: *Moore v. Moore*, 47 N. Y. 467, 7 Am. Rep. 466. See, too, *Thomas v. State*, 40 Tex. Cr. Rep. 562, 76 Am. St. Rep. 740, 51 S. W. 242.

**PACKHAM v. GERMAN FIRE INSURANCE COMPANY
OF BALTIMORE.**

[91 Md. 515, 46 Atl. 1066.]

INSURANCE—SUBROGATION.—Contracts of marine and fire insurance are essentially contracts of indemnity, and if the insured recovers the amount of his loss from any source, the insurer may recover from him pro tanto, and this right is called the subrogation of the insurer to the rights of the insured.

INSURANCE—SUBROGATION—TORT OF THIRD PARTY—RELEASE BY INSURED.—If a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety and the wrongdoer that of a principal debtor. Hence, if the assured by his own act absolutely and without reservation releases the wrongdoer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation.

INSURANCE—SUIT AGAINST WRONGDOER—RELEASE. An insured has but one cause of action against a third party for the wrongful destruction of his property by fire, and when, in a suit to recover for the entire loss, the loss on a certain part of the property is excluded in the assessment of damages, his right of action therefor is effectually released.

INSURANCE—SUBROGATION—DESTRUCTION OF RIGHT.—The right of subrogation is derivative and comes from the insured, and can only be enforced in his right. Hence, where the loss under an insurance policy is caused solely by the wrongful act of a third party, a recovery by the insured against such third party for the entire loss destroys the insurer's right of subrogation.

INSURANCE—SUBROGATION—DESTRUCTION OF RIGHT—ACTION AGAINST INSURER.—Where an insured before suit brought by him against the insurer, or at the time of filing his plea therein, has by a release of all right of action against the wrongdoer, destroyed the insurer's right of subrogation, he has also destroyed his own right of action against the insurer.

INSURANCE—SUBROGATION—PLEADING.—In an action on an insurance policy, which provides for the assignment of the right of the insured upon payment of the loss by the insurer, while ordinarily the insurer must plead payment or a tender as a condition precedent to subrogation, yet this is not required where the insured has destroyed the insurer's right of subrogation by a release of all right of action against the wrongdoer, since in such case the insured possesses no right which he could assign.

INSURANCE—SUBROGATION.—AN ADJUSTER of an insurance company has no power to consent to the extinguishment of the insurer's right of subrogation.

George Whitelock and Edward I. Koontz, for the appellant.

Edwin G. Baetjer, for the appellee.

521 PEARCE, J. On December 10, 1896, the appellee issued a policy of insurance to the appellant, insuring him against loss

by fire to the amount of seven hundred and fifty dollars for one year on "office furniture and fixtures generally, including iron safe, stationery, and supplies, contained in brick building No. 14 Light street, Baltimore," which policy was regularly renewed, the last renewal expiring December 13, 1899. This policy contained the following clause: "Whenever this company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town, or other corporations, or to prosecute therefor at the charge and for account of the company if requested." On December 22, 1898, while this policy was in force, the property described in and insured thereby, together with a large stock of merchandise belonging to the plaintiff, was destroyed by fire, caused by the alleged wrongful conduct or negligence of the Consolidated Gas Company of Baltimore City. The plaintiff held other policies in several companies upon his stock of merchandise, and on February 11, 1899, instituted suit against the Consolidated Gas Company for the loss suffered by him on his merchandise and property, and on the profits of his business, by reason of the fire so caused by the negligence of the gas company. Upon the impaneling of a jury to try the case, the parties thereto agreed that a verdict should be rendered for the plaintiff for eighteen thousand dollars, which was accordingly rendered, and under interrogatories duly propounded to the jury, these damages were by the express agreement of the parties, apportioned by fixing nine thousand dollars as the loss on merchandise, and nine thousand dollars as the loss on profits in business. The loss sustained on furniture and fixtures was, by express agreement of the parties to the suit, wholly excluded from the consideration of the jury, and from the damages ⁵²² awarded by the verdict, though the same negligence and the same resulting fire caused all the damage sustained. Judgment was entered on the verdict, and this judgment was subsequently satisfied by payment in full. There was no reservation to the plaintiff, either in the agreement or verdict, of any right of action for the loss sustained on furniture and fixtures under the policy now in question, nor any qualification as to the effect of said verdict and judgment upon any further or other liability of defendant by reason of said negligence.

On July 5, 1899, this action was commenced. The narration is in the usual form. The defendant pleaded: 1. The general issue; and 2. A special plea setting forth all the facts above recited, and averring that their effect was to destroy the defendant's right of subrogation stipulated for in the policy, and to release

it from liability thereon. The plaintiff demurred to this plea, and the demurrer was overruled, which ruling presents the first and most important question in the case.

After the ruling on the demurrer, the plaintiff filed a replication alleging that the defendant was a party to the agreement mentioned in the plea, and that it assented to everything done in pursuance of that agreement. The defendant in its rejoinder traversed this replication, and issue was joined thereon. Two exceptions were taken to the rulings on the testimony which will be noticed hereafter.

At the close of the testimony, the court, at the instance of the defendant, instructed the jury that no testimony had been offered tending to prove that the defendant was a party to the agreement or assented to the proceedings mentioned in the replication to the second plea, and that their verdict must be for defendant, to which ruling the defendant took its third exception. The ruling upon the demurrer will be first considered, and for this purpose we are confined to the facts averred in the second plea. These, being all issuable and well pleaded, their truth is admitted by the demurrer which denies that they constitute a good defense. ⁵²³ The facts thus admitted are substantially these: 1. That the policy sued on secured to the defendant by express contract, upon payment of any loss under the policy, all the plaintiff's right to recover satisfaction therefor from any person or corporation wrongfully causing the loss; 2. That the loss arising on that policy and sought to be recovered by the plaintiff was caused solely by the wrongful conduct or negligence of the Consolidated Gas Company, which was the same negligence that caused, by one and the same act, the loss and damage recovered by the plaintiff from the gas company; and 3. That the plaintiff, in order to secure the judgment thus obtained against the gas company, deliberately adopted a procedure by which he disabled himself from performing his agreement to assign over to the defendant his right to recover satisfaction for the loss incurred on this policy. If these facts operated to release and discharge the defendant from liability on the policy, the demurrer was properly overruled; otherwise not. Whether these facts did so operate must depend upon the applicability and effect of certain legal rules and principles which are well established. Contracts of marine and fire insurance are essentially contracts of indemnity, and if the insured recovers the amount of his loss from any source, the insurer may recover from him *pro tanto*, and this right is called the subrogation of the in-

surer into the rights of the insured: *Anson on Contracts*, 8th Eng. ed., 238; *Castellain v. Preston*, 11 Q. B. Div. 380.

"The insurer is treated as a surety who is entitled to all the remedies and securities of the assured, and to stand in his place, and use his name in an action to recover the money which he has paid. This right is based upon the equitable doctrine that where one has been obliged to pay money to another by the non-feasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation toward the party suffering the loss he may be compelled to do, shall be allowed, ⁵²⁴ indirectly, and through the right which the injured party had, to compel the wrongdoer to bear the burden which was imposed by his fault, although between him and the wrongdoer there is no direct relation upon which to found a cause of action. . . . The liability of the wrongdoer is, in legal effect first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. And where the party insured insists upon his remedy against the party secondarily liable, he is conscientiously bound to make an assignment in equity to the person entitled to the benefit, and the acceptance of the indemnity from the insurer is in the nature of an equitable assignment, which authorizes the insurer to sue in the name of the insured for his own benefit, and this is a right which a court of equity will support by restraining and prohibiting the insured from defeating it by a release": *May on Insurance*, sec. 454.

We have reproduced the above passage from a distinguished text-writer because it condenses and states with great clearness the fundamental principles upon which the decision of this case must turn, and which have been repeatedly applied by the courts in insurance cases. Thus, in *Hall v. Railroad Cos.*, 13 Wall. 370, it is said: "Standing thus, as the insurer practically does, in the position of surety, whenever he has indemnified the owner he is entitled to all the means of indemnity which the satisfied owner had against the party primarily liable." In the case of *The Sidney*, 23 Fed. 88, the court said: "In such cases, the insurer on payment is held to be equitably entitled to stand in the shoes of the assured, and to recover such indemnity as the assured was entitled to recover against other persons having no right to the benefit of the insurance." Both branches of the passage cited from *May on Insurance*, section 454, are well and strongly stated in *Dilling v. Draemel*, 16 Daly, 105, 9 N. Y. Supp. 497, where the court says: "It is well settled that if a loss

under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a ⁵²⁵ mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case, including the right of subrogation. The same principle is applicable to a contract of insurance, if the assured destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss." In the case last cited, the plaintiff's goods, insured against loss through collapse of building, were injured by the fall of part of the building in consequence of his landlord's excavating on an adjoining lot, and he brought an action therefor against the landlord, which was settled on payment of a certain sum, and a release under seal was given against all claims or demands whatsoever; and it was held that such release barred a subsequent action by plaintiff on his insurance policy to recover any part of such loss, as it destroyed the right of subrogation of the company, the court saying: "If the assured by his own act absolutely and without reservation releases the wrongdoer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation."

In *Carstairs v. Mechanics' Ins. Co.*, 18 Fed. 473, plaintiffs sued the insurance company to recover the value of goods lost in transit from Peoria to Philadelphia, by a collision which was within the risk of the policy, which, as in the case before us, stipulated that the insurance company, in case of loss, should be subrogated to all claims against any carrier of the goods. The bill of lading under which the plaintiffs claimed the goods provided that, in case of loss imposing liability on the carrier, the carrier should have the full benefit of any insurance effected on the goods, and the court said: "The insurance company being practically in the position of surety, and having a right to the subrogation, and the plaintiff having by the terms of the bill of lading, under which they claim the goods, defeated that right, they cannot be allowed to recover in this action." Other examples of the care with which the courts apply ⁵²⁶ the rule stated, may be found in *Niagara Ins. Co. v. Fidelity Fire Ins. Co.*, 123 Pa. St. 523, 10 Am. St. Rep. 546, 16 Atl. 790, *Atlantic Ins. Co. v. Storrow*, 5 Paige, 295, *Omaha etc. Ry. Co. v. Granite State Ins. Co.*, 53 Neb. 514, 73 N. W. 951, and *Sims v. Mutual Fire Ins. Co.*, 101 Wis. 586, 77 N. W. 908, but it is not necessary to do more than refer to them.

It yet remains for us to determine whether the proceedings resulting in the judgment against the gas company released the wrongdoer and destroyed the defendant's right of subrogation.

Now, there was in this case but one tortious or negligent act of the gas company resulting in one fire which occasioned at one and the same time, as well the loss incurred under this policy, as the loss incurred under the other policies for which recovery was had against the gas company. This is admitted by the demurrer, as well as the further facts that that suit was for the whole loss occasioned by the fire; that there was no reservation of any right by the plaintiff for the protection of this defendant, and no agreement qualifying the effect of the verdict, and that by the direction of the plaintiff the recovery did not include any compensation for loss incurred under this policy, and the defendant has no interest in the recovery, as to the policy with which we are now concerned. For a single indivisible tort but one suit can be brought. The plaintiff in this case could not now bring another suit against the gas company for his own benefit to recover the loss incurred under this policy, nor could such suit be brought in his name for the benefit of the defendant. As was said in *Platt v. Richmond etc. R. R. Co.*, 108 N. Y. 364, 15 N. E. 393: "The right of subrogation is derivative, and comes solely from the assured, and can only be enforced in his right. If the assured has no right which he can transfer to the insurer, then the insurer can have no subrogation and cannot take the place of the assured for the purpose of enforcing the liability of the wrongdoer for the loss." And in *Aetna Ins. Co. v. Hannibal R. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96, it is ⁵²⁷ said: "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrong was single and indivisible and gives rise to one liability. If one insurer could sue, then if there are a dozen, each may sue, and if the aggregate amount of the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held one hundred years ago in a case whose authority has been recognized ever since, both in Great Britain and in this country, i. e., *Assurance Co. v. Sainsbury*, 3 Doug. 245."

The plaintiff had one indivisible cause of action against the gas company, and that cause of action has been merged in the judgment he obtained. When he excluded from that judgment so much of that cause of action as relates to this policy, he as effectually released so much of his right of action as if he had

executed and delivered a release under seal therefor, and as clearly and unequivocally destroyed the defendant's right of subrogation as he would have destroyed it by such release. Any act which makes performance of the agreement to assign either impossible or useless must relieve the insurance company from its concurrent obligation to pay. The plaintiff in the present case, in order to protect his larger interests under the other policies, and his interest in recovery for loss of profits which were uninsured, has seen fit, for reasons doubtless satisfactory to him, to sacrifice his own and defendant's interest under the policy in question, and cannot now be heard to complain of the result of his own course of conduct. In *Commercial Union Assurance v. Lister*, L. R. 9 Ch. App. 483, the owner of a building insured it against fire, and it being burned by negligence of a municipal corporation, he brought an action for damages against the corporation. The insurance company attempted to restrain a proposed compromise, and it was held that the owner was dominus litis, and would be allowed to conduct the suit without interference by the insurers, but would be liable for anything done by him in prejudice of their right of subrogation.

⁵²⁸ And in *Dunham v. North Eastern Mut. Ins. Co.*, 1 Low. 253, Fed. Cas. No. 4152, it was said: "If the assured fraudulently attempts to release a wrongdoer, he must still give credit for all he might have recovered, and willfully negligent conduct, by which the underwriter had lost his remedy, might discharge the underwriter, as fraud certainly will."

It was argued for the appellant that as the policy only provides for an assignment of the right of the insured upon payment of the loss, that the plea should have averred payment or tender of payment as a condition precedent to subrogation, and, not having done so, was defective, and the demurrer should have been sustained. It is true that mere equitable subrogation cannot be demanded, without full payment, as has been frequently held in this state: *Parrott v. Chestertown Nat. Bank*, 88 Md. 516, 41 Atl. 1067, and cases there cited; and it is equally true that where there is, as here, an express contract for subrogation upon payment of the loss, the form of the contract imposes the same condition precedent. If, therefore, the right of subrogation in this case had not been destroyed by the act of the insured, we should be obliged to give effect to this rule, and sustain the demurrer, because in neither aspect of the case could the insurer demand substitution in advance. A demand made by a surety for subrogation before he has discharged the lia-

bility out of which it grows is without anything to support it, and the creditor may properly refuse it without affecting thereby his right of action against the surety: *Niagara Fire Ins. Co. v. Fidelity Ins. Co.*, 123 Pa. St. 525, 10 Am. St. Rep. 546, 16 Atl. 790. But the converse of this proposition is necessarily equally true, and where the creditor before suit brought by him against the insurer, or at the time of filing plea therein, has, by a release of all right of action against the wrongdoer, destroyed the insurer's right of subrogation, he has also destroyed his own right of action against the insurer. In such a case, to require the insurer's plea to aver payment, or tender, in order to entitle him to an empty assignment of an extinguished right, would be a refinement in pleading which the law does not require or sanction.

⁵²⁹ We are, therefore, of the opinion that the demurrer was properly overruled. This brings us to the ruling on defendant's prayer.

The plaintiff's replication to the second plea was not a traverse, but a plea of confession and avoidance, alleging that the defendant was a party to the agreement set up in the plea, and admitted, or not denied, by the replication. The defendant traversed this replication, and the issue which was joined thereon was "that the defendant was a party to the agreements set up in the plea" resulting in the release of the right of action. Upon this issue the plaintiff had the affirmative, and consequently the burden of proof: *Stephen on Pleading*, sec. 94. The only witnesses who testified in the case, so far as the record discloses, were the plaintiff and his two attorneys in the suit against the gas company, Messrs. Whitelock and Colton. Mr. Deming, the defendant's adjuster, was not sworn in the case. The plaintiff apparently knew nothing about the agreements beyond the amount proposed as the basis of compromise, eighteen thousand dollars, and its equal division between himself and the insurance companies. In his first examination he was not interrogated at all on the subject. He was subsequently recalled and testified in regard to the preliminary conference the night before the agreements were made, but gave no details; all that he could say was that, so far as he could judge, the adjusters, upon the part of the insurance companies, acquiesced in acceptance of the settlement of eighteen thousand dollars, to be equally divided, as stated, and he expressly stated that he could not recall any reference to the policy now in question. Mr. Whitelock testified that he never saw any officer of the de-

fendant in reference to the matter, and never had any conference with anyone representing it, except Mr. Deming. There is no contention that Deming bore any other relation to the defendant than that of adjuster, and no authority is required to show that an adjuster has no power to consent to the extinguishment of the insurer's right of subrogation, and that if he had attempted to give such consent, ⁵³⁰ it would not have bound the defendant without proof, other than his own statement or admission, of general agency or special authority for the purpose. But it is plain from the testimony of Mr. Whitelock that he did not attempt to give consent, and that when requested prior to the consummation of the agreements to sign a memorandum of instructions for the purpose, he declined, saying he had no such authority, though he said he had no doubt it would meet with approval. Mr. Colton's testimony adds nothing to that of Mr. Whitelock. Taken most strongly for the plaintiff, it only shows that "as an adjuster, as an insurance man," Mr. Deming thought the settlement "a good one." There is not a particle of evidence to show that his attention was called to the fact that this settlement would in any manner affect the defendant's rights under this policy. It is, we think, perfectly plain that he never attempted to bind the defendant, when he expressly disclaimed authority to do so, and his expressed confidence that the agreements would be approved have not been justified by a word of evidence in this case to show such approval. Mr. Whitelock as attorney had no power to bind the company by a compromise (*Maddux v. Bevan*, 39 Md. 485), and very properly declined to attempt to do so, as shown by his testimony. We therefore think defendant's prayer was properly granted. We have not perceived any error in the exclusion of the evidence set forth in the first and second bills of exception, but inasmuch as the conclusions we have reached require the affirmance of the judgment it is unnecessary to review them.

For the reasons given the judgment will be affirmed.

Judgment affirmed, with costs to the appellee above and below.

INSURER, SUBROGATION OF.—An insurer, after paying a loss incurred by the assured, is subrogated to all the rights of the assured against the person or corporation whose tortious act has caused the loss: *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 41 S. C. 408, 44 Am. St. Rep. 725, 19 S. E. 858. If the insured receives damages from the wrongdoer before payment by the insurer, the amount so received will be applied pro tanto in discharge of the

policy. And where the insurance company has indemnified the insured, the latter cannot release his cause of action against the wrongdoer, because the company is entitled to be subrogated to his rights: See the monographic note to *Mobile Ins. Co. v. Columbia etc. R. R. Co.*, 44 Am. St. Rep. 737.

EXPRESSMAN'S MUTUAL BENEFIT ASSOCIATION v. HURLOCK.

[91 Md. 585, 46 Atl. 957.]

APPEAL—RECORD—BILL OF EXCEPTIONS.—RULINGS ON DEMURRERS, and upon motions to set aside or in arrest of a judgment, should appear on the face of the record and should not be taken to an appellate court by bill of exceptions.

BENEFIT SOCIETIES—PLACE OF CONTRACT.—Where a policy of insurance, issued by a benefit society chartered in one state, is delivered to the insured by the society's agent in another state, and the assessments and dues are to be paid to, and the claim of the beneficiary is to be paid by, such agent, the contract is made and to be performed in the latter state, and the rights of the parties are to be determined by the law of such state.

JUDGMENTS IN REM—INSURANCE FUND—DECREE OF COURT IN ANOTHER STATE.—AN INTERPLEADER suit is not, in its nature, a proceeding in rem. Hence, where an insurance company files a bill of interpleader in one state alleging that a fund due under a policy is claimed by several parties, and pays the money into court, a decree of such court awarding the fund to another claimant is not binding on a nonresident administrator, who was not a party to the suit except by publication.

BENEFIT SOCIETIES—DEATH OF BENEFICIARY BEFORE INSURED—WHO ENTITLED TO FUND.—The administrator of the beneficiary named in a policy of insurance issued by a mutual benefit society is entitled to recover the amount of such policy as against the executrix of the insured member of the society, even though such beneficiary died before the insured, where the insured member had made no appointment of a new beneficiary before his death.

William S. Thomas, for the appellant.

Richard S. Culbreth, for the appellee.

589 FOWLER, J. On the ninth day of September, 1899, the plaintiff, as administrator de bonis non cum testamento annexo of Eliza E. Ehrman, brought suit in the superior court of Baltimore City on two certificates or policies of insurance for one thousand dollars each, issued to Charles H. Ehrman, by the Expressman's Mutual Benefit Association, a corporation formed under the laws of New York, and doing business in this state,

being represented here by an agent who resides in the city of Baltimore. The ⁵⁹⁰ defendant corporation was formed for the sole benefit of its members and their beneficiaries and not for profit—its object being the collection of contributions or assessments, and the distribution thereof to such beneficiaries as shall be entitled thereto under its by-laws and charter and the policies issued thereunder. Charles H. Ehrman, the holder of the two policies or certificates on which this suit was brought against the association, died in January, 1899, and was, at the time of his death, a member in good standing. It appears that his wife, Eliza E. Ehrman, was duly designated as the beneficiary, that is to say, the person to receive the insurance money at his death, and her name was therefore so indorsed upon said policies, and so entered upon the books of the company. She died, however, about a year before his death, and in the interval between her death and his, he made no designation or appointment of a new beneficiary, and no other name was either indorsed on the policy or entered upon the books of the defendant as beneficiary in the place of hers. Upon his death the requisite proof thereof was duly furnished, and the defendant thereupon assessed its members to the amount of the two certificates, two thousand dollars, and that sum was collected and was in its hands at the time this suit was brought.

The contention of the plaintiff, the administrator de bonis non cum testamento annexo of Mrs. Ehrman, is that the insurance money due and payable by the defendant on the two policies sued on are part of her estate, while this position is denied by the defendant, on the grounds: 1. That upon a true construction of the certificates the insurance money is payable to the executrix of the insured, Charles H. Ehrman; 2. That a court of the state of New York, of competent jurisdiction in a cause in which the plaintiff and all other parties claiming said fund were parties, has so decided, and that by and under the decree of that court passed in said cause the defendant paid to said executrix of Charles H. Ehrman the money claimed by the plaintiff in this suit; and 3. That the contract of insurance made between the defendant and Charles H. Ehrman ⁵⁹¹ and his beneficiary being a New York contract, it must be construed, not by the law of Maryland, but by the law of New York.

During the progress of the trial five exceptions were taken by the defendant. The first bill of exceptions relates to the ruling sustaining the demurrer to defendant's fourth plea, which sets up payment and pleads the decree of the New York court

as justification thereof, and as a final adjudication of the matter involved in this suit. We have several times called attention to the fact that rulings on demurrers, upon motions to set aside or in arrest of judgment, should not be brought to this court by bill of exceptions. Such rulings should appear on the face of the record, and a bill of exceptions in such cases is not only not necessary but irregular: *Davis v. Carroll*, 71 Md. 569, 18 Atl. 965; *Poe's Practice*, sec. 312. The same question, however, is properly presented by another part of the record, by which it appears by an appropriate entry on the docket that the demurrer in question was sustained. The subject of the second bill of exceptions is the ruling of the court by which the deposition of one of the defendant's witnesses taken under a commission issued to New York was not certified under the seal of the officer by whom it was taken. The refusal to admit in evidence a certified copy of the proceedings in the New York court, which are set out in the fourth plea, forms the ground of the third exception. The fourth was taken to the ruling by which a certified copy of the bill filed by defendant under oath and offered by plaintiff was admitted as evidence against the defendant. Although we have thus stated all the rulings of the court, it will not be necessary to consider them seriatim, for if the contract here sued on is a Maryland contract and the New York court never had jurisdiction of the plaintiff, the law of this state, as declared by this court in *Thomas v. Cochran*, 89 Md. 390, 43 Atl. 792, must control, and it would follow that although some errors may have been committed below, yet as it is evident that this plaintiff is the only one who ⁵⁹² can rightfully claim, the judgment would have to be affirmed.

We will briefly consider: 1. Whether the contract sued on is a Maryland contract; and 2. The jurisdiction vel non of the New York court.

1. It seems to us too clear for controversy that the contract must be regarded not only as a contract made here, but one also to be performed here. The certificate of membership or policy held by Charles H. Ehrman certifies that from a certain date he was admitted as a member of the association, but it is evident that he did not become a member until he had paid the premium and had accepted the policy. It is true that one of the witnesses testified that the signing of the certificate by the proper officers in New York constitutes the applicant a member of the association, but while that may have been his opinion, we do not think it follows as a conclusion of law from the facts

in the record. On the contrary, we see no reason why the general rule applicable to contracts of this character should not apply, namely, that the contract is not a completed contract until it is tendered by one party and accepted by the other. In the case of *Stevens v. Rasin Fertilizer Co.*, 87 Md. 683, 41 Atl. 166, the question was presented as to whether certain policies issued by a mutual fire insurance company of Massachusetts were Massachusetts or Maryland contracts. And it was held that they were not consummated and completed until they were delivered here to the insured, and that, therefore, they were to be treated as Maryland contracts. It will be remembered that the policies here involved were delivered by the defendant's agent to the insured in Baltimore City.

We think it equally clear that these contracts were to be performed in this state. It appears from the rules and regulations of the defendant, as well as by the testimony of its representatives in this state, that the assessments and dues were paid by members to him for the company, and that claims of beneficiaries were paid by him for the company to the claimants. We conclude, therefore, that these contracts ⁵⁹³ were not only made in this state, but that they are to be performed here. But even if it be conceded that the first proposition cannot be maintained, the second must be admitted, upon the facts which we have stated. The general law applicable to contracts entered into in one state to be performed in another is thus briefly but comprehensively stated by the supreme court in *Scudder v. Union Nat. Bank*, 91 U. S. 412: "Matters connected with its performance are regulated by the law of the place of performance; matters respecting the remedy depend upon the law of the place where the suit is brought." It would follow, therefore, that even if, as contended by the defendant, these certificates were completed contracts when signed in New York, yet the rights of the parties thereunder must be determined by our law. And this is the theory upon which the prayers of the defendant itself were framed, for all of them, except one, require the finding of the fact that the policies were delivered to or accepted by the insured here. But, without regard to authority, it would be a most remarkable situation if all the contracts made by our citizens with foreign corporations, under the same circumstances these were made, are to be construed, and the rights of parties thereunder to be settled, by the laws of other states. We cannot adopt a view leading to such results. Of course, we do not mean to say that contracts could not have been made in New York to be performed there.

2. The remaining question to be considered is whether the decree passed by the New York court is binding upon the plaintiff. The answer to this question in a great measure depends upon another, and that is whether the suit in which the decree was passed was a proceeding in rem or in personam, for if the latter it is clear the plaintiff is not bound, for the reason that he was not summoned except by publication. We shall not undertake, nor is it at all necessary for the purposes of this case, to attempt to give any general definition of a judgment in rem. That, says Mr. Freeman, in his work on Judgments, section 606, is a difficult task.⁵⁹⁴ But there are many cases in which we can at once say no such judgment or decree can be passed. Such, we think, was the nature of the suit instituted in New York, the decree in which is relied on by the defendant as a defense to the claim of the plaintiff. There were several claimants for the money due on the policies, but this fact certainly would not change the character of the suit from one in personam to one in rem. In the section just cited—2 Freeman on Judgments, section 606—it is said: "There may, however, be cases in which property is in the state, and even in the custody of the court, and in which the judgment disposing of it is neither in rem nor binding on a nonresident party to the action who did not appear therein. Thus it has been held, where an insurance corporation was sued in the state wherein it was located, and paid the money into court and obtained an order requiring a nonresident claimant to appear and interplead with the plaintiff, and served such order on the nonresident personally in the state of his residence, that such order could not compel the nonresident claimant to appear, and that the judgment finally entered disposing of the moneys in court was not in rem, and constituted no defense to an action brought by the claimant against the corporation in the state wherein he resided." The case of *Cross v. Armstrong*, 44 Ohio St. 614, 10 N. E. 160, is cited by the author. In that case it was held that in a suit brought against the company by the widow of the insured upon a policy in which she is named as beneficiary, in a court in the state where such company is located, and in which suit, by direction of the court, the company brings into court a sum of money sufficient to satisfy the amount due on the policy, and obtains an order requiring the administrator, resident in Ohio, to appear and interplead with such widow as to their respective claims under the policy, service in Ohio of a copy of such order and of citation upon the administrator, do not give the court jurisdiction of his person and (there being no appear-

ance nor other service on such administrator) a judgment in the action ⁵⁹⁵ purporting to debar him from any claim or right as against the widow is, as to him, void. The opinion of the court in the case just cited contains a full and careful statement of the law relating to judgments in rem, and is worthy of careful consideration. "The proceeding," says the court, "was clearly one of interpleader and that only. We do not understand that an action in personam, simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action in rem, or that an interpleader suit is, in its nature, a proceeding in rem." But even if the plaintiff here had voluntarily appeared in the New York court the other claimant could have effectually disposed of him and his claim by denying his power as administrator to maintain a suit for the collection of assets in a New York court: *Citizens' Nat. Bank v. Sharp*, 53 Md. 529; Story on Conflict of Laws, sec. 513.

We refrain from commenting upon the fact that the New York suit was commenced after our decision in *Thomas v. Cochran*, 89 Md. 390, 43 Atl. 792, was announced, when all doubt as to who was the lawful claimant had been removed, and that it was prosecuted to decree in spite of the fact that both the defendant company and the person to whom the money was paid, the latter being a resident of this state, had, after appearing and answering, been enjoined and prohibited by a decree of circuit court No. 2 from proceeding further with the interpleader bill in the New York court.

It results from what we have said that the demurrer to fourth plea was properly sustained, that the New York court never had jurisdiction of the plaintiff, that the contracts sued on are Maryland contracts, and that the rights of parties thereunder must be determined by our law, and finally the law announced in *Thomas v. Cochran*, 89 Md. 390, 43 Atl. 792, namely, that the plaintiff, the administrator of Mrs. Ehrman, the wife of the insured, whose name was indorsed on the policy and entered on the books of the company as beneficiary, is entitled to recover, and that under no circumstances ⁵⁹⁶ could the executrix of the husband, to whom the defendant paid the money, maintain a suit to recover it in Maryland. The questions raised by the other exceptions need not be considered, as what we have said disposes of the case.

Judgment affirmed.

CONTRACT, PLACE OF.—AN INSURANCE POLICY signed in New York, by which it is agreed that premiums and losses shall be paid in that state, and the policy construed as having been made therein, is a contract thereof, though the insured resides in another state: *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157. In the absence of a stipulation, however, a contract of insurance is deemed to be a contract of the place where the last act was done or assent given necessary for it to become operative and binding: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51. See, further, *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519.

INSURANCE.—WHERE THE BENEFICIARY DIES before the insured member in a benefit society, no interest in the fund vests in the beneficiary, and her surviving son inherits no part thereof: *Rollins v. McHatton*, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254.

INTERPLEADER.—WHERE A NONRESIDENT is made a defendant in a proceeding in the nature of an interpleader, a judgment rendered against him upon a personal service in the state where he resides is void: *Hinton v. Penn Mutual Life Ins. Co.*, 126 N. C. 18, 78 Am. St. Rep. 636, 35 S. E. 182. Interpleader, in general, is the subject of the monographic note to *Shaw v. Coster*, 35 Am. Dec. 695-712.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

HAVEN v. OWEN.

[121 Mich. 51, 79 N. W. 938.]

JUDGMENTS — COLLATERAL ATTACK — ALTERATION.
A decree for the sale of lands for taxes, fair upon its face, cannot be collaterally attacked by showing that, subsequently to its entry, a blank therein was filled, so as to show the amount decreed against the land.

PRACTICE—SUBSTITUTION OF VALID FOR VOID ORDERS.—The court has power to substitute a valid order for a former void order, if the substitution is made in time and follows the requirements of the statute.

H. E. Thomas and W. C. Nichols, for the appellant.

T. E. Barkworth, for the appellees.

52 MOORE, J. This is an action of ejectment. Plaintiff's title is a tax deed for the taxes of 1890, 1891, and 1893. Defendants were allowed to attack by parol the decree for a sale of the lands for the taxes of 1890 and 1891 by showing that in the decree, when entered, was a blank under the heading "Amount Decreed Against Lands," which was, subsequent to the signing of the decree by the judge, filled out by an employé in the office of the county treasurer. If this was made to appear in the original proceeding, either by a petition to set aside the decree or by a bill of review, it would be a fatal defect: *Morgan v. Tweddle*, 119 Mich. 350, 78 N. W. 121; *First Baptist Church v. Roberts*, 120 Mich. 704, 79 N. W. 910. It is claimed, however, that in a collateral proceeding an attack by parol upon a decree fair upon its face cannot be made. This is a collateral proceeding: *Peninsular Sav. Bank v. Ward*, 118

Mich. 87, 76 N. W. 161, 79 N. W. 911. Counsel for the plaintiff contend for the following rule: "The records of a court of record are of such pre-eminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes": Citing 3 Blackstone's Commentaries, 24, 331; 9 Bacon's Abridgment, 556; Starkie on Evidence, 317; 1 Greenleaf on Evidence, secs. 19, 538.

In *Koren v. Roemheld*, 7 Ill. App. 646, the court says: "The record, when tried by itself, was complete in every particular. While a stranger to a judgment may, if injuriously affected thereby, collaterally impeach such judgment by showing that the court had no jurisdiction of the person of the defendant in such judgment or of the subject matter, or that it was obtained by fraud and collusion between the parties to it, . . . we are of opinion that where there is jurisdiction of the person and subject matter, and the judgment is not the result of fraud and collusion between the parties to it, and it is material only to establish the fact of such judgment and those legal ⁵³ consequences which result from the fact, the record must be regarded as conclusive, even as to strangers. . . . The object of these rules is to give stability and security to judgments, decrees, and sentences, when made by courts having jurisdiction of the person and subject matter. They are, therefore, founded in, and supported by, a sound public policy, which demands of the courts an inflexible adherence to them": See, also, *Van Fleet on Collateral Attack*, secs. 349, 526; *Black v. Ross*, 37 Mo. App. 250; *Phillips v. Lewis*, 109 Ind. 62, 9 N. E. 395; *Watts v. Bublitz*, 99 Mich. 586, 58 N. W. 465; *Scotten v. Detroit*, 106 Mich. 564, 64 N. W. 579; *Allured v. Voller*, 112 Mich. 357, 70 N. W. 1037; *Miller v. Smith*, 115 Mich. 427, 69 Am. St. Rep. 583, 73 N. W. 418, and the many cases there cited. We think the court erred in permitting the decree to be attacked by matter *dehors* the record.

The decree in relation to the tax of 1893 was held invalid because the chancery journal showed that on August 10, 1895, an order was made fixing the hearing of tax cases for the opening of court on the twenty-third day of September; that on September 17th an order was made revoking the order of August 10th, and fixing the time for hearing on the petition of the

tax cases for November 4, 1895. The orders themselves are not returned with the record, nor are the petitions upon which they were based, if any such petitions were filed. It may have been made to appear to the court that the first order was a void one, and that the second order was necessary. Section 66 of the tax law of 1893 (Act No. 206, Pub. Acts 1893) contemplates that the court shall make such orders as are necessary to facilitate the proceedings. We do not think it can be said that, if an order is made that is void, the court cannot make a valid order to take the place of the void order, if the valid order is made in time, and follows the requirements of the statute.

Judgment is reversed and new trial ordered.

The other justices concurred.

Forged or Altered Judgment Entries - Collateral Attack Upon.

"On principle, it cannot be shown in a collateral action that a judgment entry has been forged or altered, for the very plain reason that the only legitimate evidence is a duly certified copy of the alleged entry; and anything that the officer in charge of the original will certify to is conclusive. No one but the officers in charge of the records of a court can lawfully have access to them. No other court can send its subpoena duces tecum for them, and no statute or rule of common law has ever so provided. Even where the collateral attack is in the same court, it has no lawful right to have the original records brought before it for inspection, the only issue permitted being nul tiel record. When the original or a copy is read to the court, it must decide the issue on that. The issue that a record has been forged or altered can only be raised or tendered in a direct proceeding between the parties or their privies to cancel or correct it. In such a proceeding, the court can both inspect the record and hear witnesses and decide the issue. Hence, in my opinion, all cases which hold that a record may be shown to be forged or altered in a collateral proceeding, are wrong." Such is the view expressed by Judge Van Fleet in his treatise on Collateral Attack, section 549. The doctrine of the weight of authority is undoubtedly in accord with the reasoning above expressed, but, at the same time, some sensible cases exist which maintain the contrary rule.

Clerk's Entries.—Thus, a tax judgment cannot be collaterally impeached by showing that entries made therein were made after the rendition of the judgment. If the judgment has been materially and illegally altered, it must be corrected in a direct proceeding, and cannot be impeached collaterally, as was here attempted: *Gribble v. Livermore*, 64 Minn. 396, 67 N. W. 213. And a judgment cannot be impeached in a collateral action by show-

ing, dehors the record, that the clerk entered the judgment in the records of the court, without its authority or direction: *Hennessy v. St. Paul*, 54 Minn. 219, 55 N. W. 1123. In this case it was said that: "It is further claimed that the court erred in refusing to allow plaintiff to prove dehors the record, that the court never had overruled his objections, or rendered judgment, but that the clerk entered judgment without any order or authority from the court. Very clearly, the judgment cannot be impeached and contradicted in this collateral manner. In any collateral proceeding it must be conclusively presumed that every entry made in the records of the court is a statement of the action of the court, and was made by its direction and authority": *Hennessy v. St. Paul*, 54 Minn. 222, 55 N. W. 1123. A judgment written out and spread upon the record, after the adjournment of court, by the clerk thereof, at the instigation of the attorney for the adverse parties, taxing costs against two only of the defendants, when the entry on the docket of the judge authorized a general judgment against all of the defendants, cannot be attacked on the ground of such unauthorized entry, in a collateral proceeding: *Black v. Ross*, 37 Mo. App. 250. When the court has jurisdiction of the parties and the subject matter, and the judgment is not the result of fraud, and it is material only to establish the fact of such judgment and its legal consequences, the record is conclusive, even as to strangers, upon collateral attack. "While it is the settled law, as we understand it, that a stranger to a judgment may, if injuriously affected thereby, collaterally impeach such judgment, by showing that the court had no jurisdiction of the person of the defendant in such judgment, or of the subject matter, or that it was obtained by fraud and collusion between the parties to it, still the true question here presented is whether, in a case where the court has jurisdiction both of the person and of the subject matter, and a complete record is produced, affirmatively showing such jurisdiction, and a judgment entered at a regular term of the court, and by its authority, it is competent, where such record is material only as to the fact of a judgment and its legal consequences, for a stranger to such judgment to introduce the oral evidence of the judge of the court to contradict the record and show that the court did not authorize the entry of the judgment." In such case "the record must be regarded as conclusive even as to strangers." It follows from the principles established, that the admission by the court below of the oral testimony of the judge and deputy clerks, for the purpose of contradicting the record, and thus attempting to show that it was not correctly made, that the judgment was not ordered by the court, and in fact did not exist, was not only a violation of such principles, but of a most dangerous tendency in unsettling the stability and security of judgments and those legal consequences resulting therefrom by virtue of general public law. For it is manifest that if the judge of a court may

thus be allowed to impeach the verity of the records of his own court, by oral testimony, nine months after judgment, as in this case, he may do so nine years thereafter. If he may do so in one case, he may likewise in all cases; and then, what is left of the stability and security of judgments? In *Garfield v. Douglass*, 22 Ill. 100, 74 Am. Dec. 137, the question was as to the admission of parol testimony to contradict the entries of a justice of the peace in his docket, and the court, by Caton, C. J., said: "The record or entry of the justice is higher and more trustworthy than any parol evidence can be. If one record is open to be questioned by parol evidence then another must be, and all security and confidence in the stability of records is gone": *Koren v. Roemheld*, 7 Ill. App. 646, 652. It is incompetent to show in a collateral proceeding that a judgment, apparently regular, was entered by the clerk of the court in the absence of the judge thereof. In such case, the record imports absolute verity: *State v. Macdonald*, 24 Minn. 48-51. In speaking of the rule that the record of the judgment cannot be attacked collaterally, on the ground that it has been altered or forged, the court in *In re Watson*, 30 Kan. 753-757, 1 Pac. 775, said: "Now, it seems to me incompetent to show by parol testimony that the court did not take the action which its journals show that it did. As between two parties, a written contract is conclusive as to the terms of their agreement, and can be overthrown only by proof of fraud or some similar matter. A fortiori, where a court has acquired jurisdiction, the only competent evidence of what the court has done is its record: and that record is conclusive as against any parol attack in a collateral proceeding. If once the door is thrown open to parol testimony of the action of a court of general jurisdiction, what limit can be placed? Suppose a judgment for one thousand dollars against a party, can he, in a collateral attack, show that the court directed judgment for only five hundred dollars? Can he, where the judgment reads for the plaintiff, prove by parol testimony that in fact the judgment was for the defendant? And yet the doctrine claimed by the petitioner would lead to exactly this result. When once you say that you can prove by parol that the record of the court is untrue, that the judgment which it recites was not, in fact, entered, you do away with all the protection which the old doctrine of the verity of judicial proceedings casts around the action of the court. I think that so far as this court has gone, the limit is placed here: You may show that the court had in fact no jurisdiction, because no process has been served, but when once it is admitted that the court did have jurisdiction, then I think the only evidence which can be received of the action of the court is its record, and that that record is conclusive against parol attack in any collateral proceeding. Suppose it be true that by fraud of a clerk an entry is interpolated improperly into the records of the court. Of course, such action would be a grievous wrong, but the remedy of the

party is an appeal to the court in which the record appears to have that interpolation stricken out. So long as that court permits it to remain, other courts must treat it as the action of that court, and as conclusive upon the question decided by it": In re Watson, 30 Kan. 757, 1 Pac. 775. In one case an attorney was sued for secretly entering a judgment upon the record of the court in vacation, but as the judgment appeared to be regularly entered in term time, it was held incompetent to prove that the record was not in fact what it appeared to be: Reid v. Kelley, 1 Dev. 313.

Some cases are opposed to the weight of authority and to the general rule above stated. Thus, it has been held that the authority of the clerk of court terminates with the rendition of the judgment and the completion of the record, and that he has no power thereafter to fill up the blank left for costs; that his action in doing so renders the judgment void, and that the fact that he did so may be shown in a collateral attack on such judgment: Chapin v. Broder, 16 Cal. 403. In another case it was alleged that a judgment of forfeiture on a recognizance was entered on the record in vacation by the clerk in a blank space left by the court for that purpose, and that the judge in term had signed his name at the foot of this blank space, and these allegations were held to show that the judgment was thus rendered void, and to open it to collateral attack: State v. Thistlethwaite, 83 Ind. 317. It has also been held competent to prove collaterally, to avoid the appointment of an administrator, that the surrogate signed the letters in blank, and that the clerk had filled them up in his absence: Rodrigues v. East River Sav. Inst., 76 N. Y. 316, 32 Am. Rep. 309. Again, in Hardy v. Broadbus, 35 Tex. 668, it was held that the alteration of a judgment by the clerk of the court at the instance of the judgment creditor rendered the judgment void, and that such fact might be shown on a collateral attack. It has also been held that equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process, and not originally included in such judgment: Chester v. Miller, 13 Cal. 558. And it has also been decided that if a judgment has been obtained and execution issued and levied on property sufficient to satisfy the debt, but is returned by order of the plaintiff, and subsequently the record is fraudulently altered and the amount of the judgment increased without the consent of the judgment debtor, and a second execution issued thereon, equity has jurisdiction to interpose by injunction to prevent its collection and relieve against the fraud: Babcock v. McCamant, 53 Ill. 214.

Justices' Entries.—If a justice of the peace enters the name of a person on his docket as bail for a stay of execution, it is incompetent for such person to show collaterally that the entry was made in his absence upon a forged letter: Clark v. M'Comman, 7 Watts & S. 469. In this case the court said: "Mistake or fraud in mak-

ing up a record can neither be averred nor proved by parol evidence in a collateral proceeding, nor in an action founded on it. The only mode of relief is through the court, where the record is thus erroneous. The record must be received as absolute verity, and speak for itself. If wrong, the only mode of having it corrected is by an application to the court, where the proceeding or judgment was had, to have it reformed according to the truth, or vacated, as may be requisite. In no other manner can a party or privy to the judgment or proceeding be relieved": *Clark v. M'Comman*, 7 Watts & S. 470. The record of a justice's court can no more be questioned collaterally by parol than can the record of the highest tribunal. Hence, it cannot be shown that a recognizance purporting to have been taken by a justice was not in fact so taken by him, or that he forged it in the absence of the obligors: *State v. Daily*, 14 Ohio, 91-98. If the record of a board of commissioners of highways shows an order opening a highway, parol evidence is not admissible in a collateral proceeding to show that such order was never made. "The record of the commissioners, so offered in evidence by the defendants, must have the same force and effect when given in evidence as is due to the transcript from a justice's docket. It would, therefore, have been inconsistent with the established rules of evidence to have suffered the plaintiff to introduce parol proof to contradict or invalidate the record, nor can an entry in the journal, nor any other writing dehors the record be used for such purpose": *Beebe v. Scheidt*, 13 Ohio St. 406-418. In *Gage v. Vail*, 73 Mo. 454, it was held that an entry made in the docket of a justice of the peace by a former justice after the expiration of his term of office is a nullity, although the entry is made in the record of a case tried before him while he was justice. Such record it was held was open to collateral attack by parol evidence. The decision in this case is certainly opposed to the better rule, that the record of the court imports absolute verity in collateral proceedings. It is also opposed to the doctrine laid down by the weight of authority and especially the case of *In re Watson*, 30 Kan. 753, 1 Pac. 775, wherein it appeared that a judgment entry was made by a judge of a case tried before him during his term of office, after his term of office had expired by resignation and when he was in fact a private citizen residing outside the district. The court decided, and we think properly decided, that parol evidence was not admissible on collateral attack to contradict the record of the court as thus made up.

Subsequent Alterations.—A judgment regular on its face, and one which the court had jurisdiction to render, cannot be attacked collaterally by showing that it had been changed in a material respect after it was first entered, without the knowledge or consent of the complaining party: *Hall v. Durham*, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581. A justice's judgment cannot be collaterally attacked and impeached, upon a motion to condemn land levied upon under

execution, by proof that such judgment was in fact rendered against three persons, and that, on a day subsequent thereto, the justice erased the name of one of the defendants, and issued execution against the other two: *Turner v. Ireland*, 11 *Humph.* 446. Parol evidence is inadmissible to show, on a collateral attack upon a justice's judgment, that the justice originally entered a judgment of nonsuit and afterward changed it to a judgment for the defendant: *Garfield v. Douglass*, 22 *Ill.* 100-102, 74 *Am. Dec.* 137. If the record shows a decree dismissing a libel for divorce "without prejudice," it cannot be shown by matter in pais in a collateral proceeding, that the words "without prejudice" were added to the record after the term of court in which the case was thus dismissed was adjourned sine die.

In *Foster v. Alden*, 21 *Mich.* 507, it was held, however, that a justice of the peace has no authority to amend his record of a judgment after the day of its rendition, even with the consent of the parties, by a change in the name of one of them, and it was also held that such amendment renders the judgment void, and the fact of such amendment may be shown by parol upon collateral attack on such judgment.

WUERTHNER v. WORKINGMEN'S BENEVOLENT SOCIETY.

[121 *Mich.* 90, 79 *N. W.* 921.]

BENEVOLENT ASSOCIATIONS—FINDINGS OF TRIBUNALS OF—CONCLUSIVENESS.—In the absence of anything in the constitution or by-laws of a benevolent association making findings of the tribunals of such society that a member is not entitled to sick benefits conclusive, they are not conclusive, notwithstanding a custom to the contrary, so as to preclude a resort to a court of law for relief.

BENEVOLENT ASSOCIATIONS — EXPULSION OF CLAIMANT OF BENEFITS AS AFFECTING RIGHT TO SUE.—A benefit society cannot affect a member's right to sick benefits, or to sue therefor, by expelling him, upon the theory that his claim is fraudulent.

BENEVOLENT ASSOCIATIONS—OBLIGATION TO PAY SICK BENEFITS—CAUSE OF ILLNESS.—In the absence of anything in the constitution or by-laws of a benefit society releasing it from obligation to pay sick benefits if caused by the indiscretion of the member, it is liable therefor, although his condition is caused by his indulgence in unnatural vice.

Lehman Brothers & Stivers, for the appellant.

A. F. & F. M. Freeman, for the appellee.

⁹¹ HOOKER, J. The plaintiff was a member of a local benevolent society, and made a claim for sick benefits amounting to seventy-eight dollars, claiming to have been entitled to them for a period of twenty-six weeks, during which time, his declaration alleges, he was sick and unable to work, on account of nervous trouble. The case was submitted to a jury, and a verdict in favor of the defendant was rendered. The plaintiff has appealed.

The evidence showed that the society placed his claim in the hands of a committee, according to its custom, and a report to disallow the claim was adopted. Subsequently, the plaintiff was expelled from the society for making a false claim, and it was contended upon the trial that, not being a member at the time the action was brought, he could not recover, for the reason that the finding of the society upon that subject cannot be reviewed by the courts. It was claimed by the defendant that the action of the society upon the claim was final and binding upon the parties. It was not shown that any provision of the constitution or by-laws made it so, but the defendant was allowed to show that such decisions were considered final by the society, under its custom of conducting business. The court instructed the jury that they might ⁹² "take into consideration, as far as the same may have been disclosed by the evidence, the action and construction which the society, from time to time, may have taken and given to its rules and regulations. I think there can be no doubt that the purpose and intent of the society, in the exercise of its benevolence, is to reach those cases where the party is unable to perform labor by reason of sickness; that the words 'sickness' and 'inability to perform labor' are synonymous terms, and mean one and the same thing. In other words, that the sickness must be of such a character that the member is unable to perform labor, and this sickness or inability to perform labor may be either of a mental or of a physical character, and the one may be as certain and serious and as incapacitating as the other. A genuine case of mental or nervous prostration may be as serious and fatal as a purely physical malady. In either case the test is, Is the member, by reason of his sickness, be it mental, nervous, or physical, in such a condition that he is too ill to perform labor? If he is, then he is entitled to his indemnity. If he is not, then he has no claim."

This instruction was evidently intended to apply to the degree of incapacity requisite to a right of recovery, but elsewhere he said: "Upon another branch of this case, independent of

what I have said, I say to you: The plaintiff in this case having placed his claim for allowance before the defendant society and its sick committee, and the society having exercised the right of discipline, and expelled the plaintiff as a member of the order by reason of placing the particular claim for allowance before the society on which he has planted his cause for action in this case—in view of this situation, and of the facts and circumstances here in testimony, courts are reluctant to interfere with the disciplinary powers of voluntary organizations like the defendant society. These societies have ordinarily organic power to discipline, correct, and remove their own members, and the courts are not inclined to interfere in this arrangement, unless it satisfactorily appears that some wrong or injustice has been done to the plaintiff. In that connection I also charge you: If from the evidence in this case you find that, in all the proceedings of the society to disallow this claim, the society acted in accordance with its rules, regulations, by-laws, and constitution, both in letter and spirit, and if the society in this matter acted ⁹³ honestly and in good faith, seeking only to do equal and exact justice, then such action is binding and conclusive upon the plaintiff, and he cannot recover or set it aside in this court. But, on the other hand, if you find from the evidence that this plaintiff has been unlawfully dealt with by the society, if the action and proceedings of the committee were unfair or unjust to the plaintiff, if the action of the committee or society was hasty, oppressive, or arbitrary, or actuated by improper or unjust motives, then such action would not be binding upon the plaintiff."

There was testimony introduced tending to show that the plaintiff's condition might be due to immoral practices, and the judge instructed the jury that: "There has been some testimony which it is claimed tends to show that the plaintiff is himself responsible for his condition; that is, that by course of misconduct he has brought upon himself his present troubles. If the plaintiff has willfully and immorally violated the laws of nature and the laws of health, and thereby occasioned his ill-health, of course he cannot charge the defendant society with the result that might naturally flow therefrom. . . . If you find from the testimony that the plaintiff was sick or in a disordered or disabled condition, and you further find that such condition was brought upon him by his own immoral and impure practices, as claimed by the defendant, your verdict, of course, must be for the defendant. The law will not permit a recovery for

a condition brought upon one's self through his own vice and immorality or by his own impure practices."

We are of the opinion that this charge was erroneous. The plaintiff's rights rested upon a contract that did not attempt to prohibit recourse to courts of law, and the prohibition of such a right cannot rest upon custom or the good faith of one of the parties. While we have held that the determination of such questions by the tribunals of an order or society may be final where the constitution and by-laws so provide, such is not the rule when there are no such provisions. A strict construction should be given to provisions abridging the common right of resort to the courts. Again, we think the society could not affect the member's right to a sick benefit, or to sue for the same, ⁹⁴ by expelling him upon the theory that his claim was a fraudulent one. If it could, there would be an easy way of defeating claims: *Bachmann v. New Yorker etc. Arbitr. Bund*, 64 How. Pr. 442. Nor do we think the instruction in relation to the cause of sickness was correct. The by-law reads as follows:

"Section 1. Every member is to receive an indemnity of three (\$3.00) dollars per week in case of sickness or inability to perform labor from the date of such sickness or inability to perform labor, but should, however, report such sickness or inability to perform labor to the sick committee at his earliest possible opportunity. Should the sickness or inability to perform labor continue for a period of more than six months, then the responsibility ceases. However, in cases of necessity, the society would render him assistance, if possible, to the best of its ability."

This is a broad provision, and contains no hint that the society will not pay when the incapacity is the result of illness due to indiscretion or vice. The claim of the defense in this case has force, by reason of the repulsive nature of the vice; but had the sickness resulted from overexertion in sport, or overeating, or the liquor habit, the same defense might be made, if this is permissible.

The judgment is reversed and a new trial ordered.

The other justices concurred.

ASSOCIATIONS—SICK BENEFITS.—A member of an association must pursue his claim for sick benefits within the society, when the constitution and by-laws so require, and, failing to do so, he cannot resort to the courts: *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; and see, further, the monographic note thereto, 59 Am. St. Rep. 203-209.

PIKE v. PIKE.

[121 Mich. 170, 80 N. W. 5.]

STATUTE OF FRAUDS—PAROL AGREEMENT CONCERNING LAND—PART PERFORMANCE.—A parol agreement by parents to deed their farm to their son, subject to their life estate, if he will surrender a lease held by him and come to live with them, is taken out of the statute of frauds by his accepting such offer and performing the conditions imposed by the contract.

A. S. Frost, for the appellant.

J. R. Cropsey and Boudeman & Adams, for the appellee.

¹⁷⁰ MOORE, J. Defendant has appealed from a decree in chancery requiring the specific performance of a contract which the complainant claims was made between himself and his mother, now deceased, and the defendant, who is complainant's father. It is the claim of the complainant that he was the only son living of his parents; that he was working a farm about one and one-half miles from them, for which he had a lease for a term of years; that his only living sister, who was childless, and her husband, were living with his father and mother upon forty acres of land, the title of which was in the mother. His claim is that, upon the death of his sister, his father and mother were anxious he should surrender his leased farm, and come to live upon the farm owned by his mother, who agreed, if he would do so, she ¹⁷¹ would deed the farm, subject to a life estate in herself and husband, to him. He avers he accepted the offer, surrendered his lease, and moved upon the farm, and, with his wife, cared for his mother as long as she lived, and was ready to care for his father as long as he lived. He further claimed that his mother sent his father to a conveyancer to have a deed drawn to carry out the agreement; that, instead of having such a deed drawn, the father had it drawn to himself; that the mother demurred to executing such a deed, but was informed a deed directly to the son would be invalid, but that the father could execute such a deed, which would be a valid deed, and would do so; that the mother, believing this statement to be true, signed the deed which was presented to her, and the husband afterward caused a deed to the son to be executed, reserving to himself a life estate. He alleges that after the death of the mother, and for the purpose of avoiding the agreement made between the son and the mother and between all three of the parties, the defendant caused the deed to the son to be de-

stroyed, and asserted his right and intention to sell the farm, and do what he pleased with the proceeds. The defendant denies that the agreement was as stated by the complainant, and, while he admits he made a deed to the son, he avers that it was because he was his only child, and he desired him to have the land after his death, but the son and his wife had so ill-treated him he had changed his mind. He asserts that, while the title to the land was in the wife, she made a deed of it to him, because he furnished the money which bought it, and that it equitably belonged to him before his wife deeded it to him; that in deeding it to him she simply carried out what she before had agreed to do. The testimony was taken in open court. The circuit judge found that the proof of complainant sustained the allegations of his bill, and made a decree in his favor. It would not profit anyone to put into this opinion any considerable portion of the testimony. It is sufficient to say of it that we think the circuit judge came to a proper conclusion as to the effect of it.

¹⁷² It is claimed on the part of the defendant that this was a contract in relation to real estate, and, because not in writing, signed by the parties to be charged, is void. This contention would be true if the contract were an executory one, but, as it has been substantially executed on the part of the complainant, it is taken out of the terms of the statute, and is such a contract as this court has repeatedly enforced: See *Twiss v. George*, 33 Mich. 253; *Lamb v. Hinman*, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709; *Fairfield v. Barbour*, 51 Mich. 57, 16 N. W. 230; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744; *Taft v. Taft*, 73 Mich. 502, 41 N. W. 481; *Putnam v. Tinkler*, 83 Mich. 628, 47 N. W. 687; *Russell v. Russell*, 94 Mich. 122, 53 N. W. 920; *Williams' Estate*, 106 Mich. 502, 64 N. W. 490; *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 389, 69 N. W. 657; *Briggs v. Briggs*, 113 Mich. 371, 71 N. W. 632.

It is said it would be inequitable and unjust to require specific performance of the contract. We cannot agree with the solicitor in this claim. As before stated, the proofs fully sustain the case as set out in complainant's bill of complaint, and the equities are with him.

Decree is affirmed, with costs.

The other justices concurred.

STATUTE OF FRAUDS.—PART PERFORMANCE takes a verbal contract to convey land out of the statute of frauds: **Maddox**

v. Rowe, 23 Ga. 431, 68 Am. Dec. 535; Merrell v. Witherby, 120 Ala. 418, 74 Am. St. Rep. 39, 23 South. 994, 26 South. 974. Contra, Washington v. Soria, 73 Miss. 665, 55 Am. St. Rep. 555, 19 South. 485. But such performance must be something done in the execution of the agreement, and not as preparatory thereto or as an inducement: Townsend v. Houston, 1 Harr. (Del.) 532, 27 Am. Dec. 732. Possession delivered in pursuance of a parol agreement is such part performance as to take the case out of the operation of the statute: Ryan v. Dox, 34 N. Y. 307; 90 Am. Dec. 696.

PEOPLE v. GILMAN.

[121 Mich. 187, 80 N. W. 4.]

CONSPIRACY TO DEFRAUD—SEANCES.—Persons combining to deceive the public by conducting materializing seances are guilty of a conspiracy to defraud any individual who pays money to witness the seances, although he is not actually deceived.

CONSPIRACY TO DEFRAUD BY FALSE PRETENSES may exist, although the means employed are not calculated to deceive persons of ordinary intelligence.

E. J. Jeffries, for the appellant.

A. H. Frazer, prosecuting attorney, and O. F. Hunt, assistant prosecuting attorney, for the people.

187 HOOKER, J. The defendant was convicted of the offense of conspiring with others to cheat and defraud one Edwin H. Sadler of the sum of one dollar. The proof showed that the defendant professed to be a materializing medium, and gave "materializing seances," in which he was assisted by others mentioned in the proof. Sadler was a detective, and attended with another detective. Before the proceeding began, defendant said that the usual collection of one dollar would be taken up, and **188** Sadler, among others, paid a dollar. During the proceedings Sadler succeeded in exposing the defendant as an impostor.

Counsel for the defendant says that there are two grounds of error relied on: 1. The information does not meet the theory of the evidence, because it is obvious that any conspiracy to defraud that may have existed was not to defraud Sadler, but the general public, and should have been so charged; 2. That no crime was committed, because it was an obvious humbug, which could not, in the nature of things, deceive any rational being.

It is apparent that the conspiracy to cheat was not specially aimed at Sadler when the scheme was concocted, but at such persons as might be induced to attend the meetings. It may be that no particular persons were in view, and, had no one attended the meeting, no one could have been named as an intended victim, although the offense of conspiracy would have been complete. An indictment in such case might charge a conspiracy to cheat "the citizens or inhabitants of the state and others," as in the case of *Clary v. Commonwealth*, 4 Pa. St. 210; or "such persons as should become purchasers": *Commonwealth v. Judd*, 2 Mass. 329, 3 Am. Dec. 54. But where the conspiracy has been carried out, and money has been obtained from some person in consequence of it, the overt act has shown and made certain what was uncertain before, viz., the person whom it was the conspirators' intention to defraud: See *People v. Arnold*, 46 Mich. 273, 9 N. W. 406.

Counsel cites the case of *United States v. Fay*, 83 Fed. 839, in support of the second point. In that case Howard paid the defendant fifty dollars upon the pretense that, through supernatural power of mental vision possessed by him, he could and would find, and inform him, Howard, of hidden treasures upon his farm. The defendant was arrested upon the charge of using the United States mail for "a scheme to defraud." Upon motion the court quashed the indictment, upon the ground that: 189 "Such a scheme manifestly must involve something in the nature of a plausible device—some such device as in itself is reasonably adapted to deceive persons of ordinary comprehension and prudence. A manifest hoax and humbug, like a proposition to take a person on a flying trip to the moon, to fit out a traveler for a submarine voyage to China, or any other scheme which belies the known and generally recognized laws of nature, cannot, in the nature of things, deceive any rational being. . . . There is a marked distinction between a case of this kind, involving, as it does, a physical impossibility, and one related to religious, moral, or ethical tenets. A scheme to defraud, planting itself upon, and seeking to take advantage of such tenets, entertained as they are by large numbers of people, has been held to be within the contemplation of the federal statutes, and with this class of cases I have no fault to find. . . . Because there is no scheme set out in the indictment reasonably adapted to deceive persons of ordinary prudence, I am of the opinion there is no scheme to defraud, within the meaning of the statute in question."

We are not disposed to criticise this construction of a statute that is not before us, but we are of the opinion that it should not be said, as a matter of law, that a citizen is not a rational being, even if he be entrapped by cheats and false pretenses which would not deceive persons of ordinary intelligence. The law is more necessary to the protection of the unwary and simple-minded, who are not looking for duplicity and deceit, than shrewder persons. Designing persons do not ply their nefarious vocations among the latter class, but seek for victims among those whose credulity makes them more easily deceived. We cannot agree with counsel in considering those who believe in the theories of spiritualism to be idiots, and, if we could, we should hesitate to say that one who conspired to cheat them would not be guilty of a crime.

It is said that the information charges a conspiracy to defraud one who could not be defrauded, because he knew the representations to be false. The conspiracy is complete when it is formed, and the guilt or innocence of the conspirators does not depend upon the success of the ¹⁹⁰ enterprise. They carried out their scheme, and obtained money from Sadler and others, which shows that he was an object of the conspiracy, though not necessarily a victim of it.

We find no error, and the judgment is affirmed.

The other justices concurred.

FALSE PRETENSES.—TO CONSTITUTE THE CRIME of obtaining money by false pretenses, loss to the victim is not essential: *State v. Switzer*, 63 Vt. 604, 25 Am. St. Rep. 789, 22 Atl. 724. Moreover, the false pretense relied upon need not be such as would be guarded against by a person of ordinary care and prudence: See the monographic notes to *Barton v. People*, 25 Am. St. Rep. 380; *Bowen v. State*, 40 Am. Rep. 75-80.

CONSPIRACY TO DEFRAUD IS COMPLETE without any act done in pursuance of it: *Commonwealth v. Judd*, 2 Mass. 329, 3 Am. Dec. 54.

JOSSMAN v. RICE.

[121 Mich. 270, 80 N. W. 25.]

MECHANICS' LIENS—DESCRIPTION OF PREMISES.—

A mechanic's lien attaches to a building erected under a contract describing the premises merely as ground situated in a certain place, when it is erected upon the only land owned by the party in the place named.

MECHANICS' LIENS—HOMESTEAD.—Under a constitutional provision making a wife's signature necessary to a valid alienation of a homestead, her homestead interest in land owned by herself and husband jointly cannot be divested by a mechanic's lien acquired under a contract signed by the husband alone, although it was entered into with her knowledge and consent, and a statute provides that if improvements are made under such circumstances, the lien shall attach as though the contract were signed by the wife.

MECHANICS' LIENS—HOMESTEAD—REMOVAL AND SALE OF BUILDING.—Under a statute providing that a mechanic's lien shall attach to a building for which labor and material is furnished, in preference to any prior title to the land on which it is built, and that when it is an original and independent building, commenced since the attaching of the prior title, its separate sale and removal may be ordered by the court, the court has power to permit the materialman to sell and remove such building, when no lien can attach because of the homestead interest of the wife, who has not signed the contract for the erection of such building.

F. E. Jenkins and J. H. Patterson, for the appellant.

G. O. Kinsman, D. N. Lowell, Baldwin, Jacokes & Moore, M. F. Lillis, and E. W. Scott, for the appellees.

271 LONG, J. This cause was commenced by bill in equity to enforce a mechanic's lien under Act No. 179 of the Public Acts of 1891, as amended by Act No. 199 of the Public Acts of 1893. The complainant resides in Oxford, Oakland county, this state, and claims for materials furnished to the contractors in the erection of a building for the defendants Rice. The materials claimed for were furnished by Jossman & Allen and by William J. Tunstead, but those parties assigned their claims to the complainant. It appears that Slater & French were the original contractors. French assigned his interest in the claim to Slater, who filed a statement of lien for that claim. The defendants appeared in the case. Defendants Rice, who are husband and wife, answered the bill. Defendant Slater filed an answer in the nature of a cross-bill, asking affirmative relief against the defendants Rice. At the time the contract was entered into for the erection of the building, the defendants Rice

resided in Lenox, Macomb county. There is no question raised over the proceedings to bring the case to an issue.

It appears that in the spring of 1896 Cassius E. Rice purchased for three hundred dollars a lot in the village of Oxford, taking the title in himself and wife jointly. They then lived at Lenox, Macomb county. At that time the lot purchased was vacant, and was situated on the principal business street of the village, surrounded by stores. Architects prepared plans, specifications, and drawings, and a contract, ²⁷² ready for signing, for the erection of a building on said lot. The contract, plans, and specifications provided for a two-story building, with a solid brick wall and basement under the entire building, with solid stone walls extending to the bottom of the basement, and an ornamental front; the building to be twenty-one feet and six inches in width; first floor finished for store purposes, and second floor for offices and living-rooms. The architects also furnished another plan, to be used if something cheaper was wanted. Defendant Slater negotiated with Cassius E. Rice relative to the erection of the proposed building. It was found by Rice that to erect the building under the original plans and specifications, as drawn by the architects, would cost too much, and therefore he and Slater agreed upon new plans and specifications. Changes were made from a solid brick wall to a veneered brick wall. The height of the building was made less, the ornamental work on the front was done away with, the excavation for cellar lessened, and many other changes were made. A new contract was drawn, which shows the contract price to be \$2,128, but the parties agreed that the price should be fixed at \$1,928. This contract was signed July 14, 1896, by Slater and defendant Cassius E. Rice. Slater was paid on the contract by Rice the sum of \$278. The balance remains unpaid, which, with some extras and interest added, made the amount still unpaid on July 25, 1898, the sum of \$1,851.30. Defendants Rice deny owing anything on the contract, claiming that the contract has not been complied with. The complainant's claim is made up of his own and Allen's account of \$272.50, and William J. Tunstead's account of \$132.88, which amounted, with interest added, on July 25, 1898, to \$450.27.

The defendants Rice, in their answer, allege that the building was not constructed in conformity to the terms and conditions of the contract, plans, and specifications; that, on account of defective construction, the contract price for the payment thereof never became due; that, because of the defects in the con-

struction by the contractors, ²⁷³ the architect refused to give his certificate that the building was constructed substantially in accordance with the contract, plans, and specifications, and that the payment therefor was due to the contractors. It is also objected by defendants Rice that the contract contains no description of the land on which the building was to be erected; that, by reason of this omission, no lien could be created under the lien law; that it is as essential that a description of the land be given in the contract as it is that a mortgage on land should contain the description; that all the description contained in the contract is that: "The said parties of the second part do hereby promise and agree well and sufficiently to erect, finish, and deliver, in a true, perfect, and thoroughly workmanlike manner, the brick store and flat building for the party of the first part, on ground situated in the village of Oxford, county of Oakland, and state of Michigan."

The defendants Rice, in their answer, deny that the contract was signed by Wilhelmina Rice, or with her knowledge and consent. They claim that the lot was purchased by them jointly in the spring of 1896, and the deed taken as joint tenants; that the land was purchased for the purpose of erecting this building, with a dwelling over the store for their permanent home; that they had no other home, and never had had a home before this since they were married.

1. There was evidence given by the complainant and defendant Slater that the completed building was in substantial compliance with the contract; that, as completed, it was worth at least \$2,000. The contract, plans, and specifications adopted varied greatly from the originals drawn by the architects in the first instance. The last plans and specifications were drawn by Slater and defendant Rice, and it was from these that the contractors worked. These were apparently faulty, and changes were made in them, but with the consent of Mr. Rice. We are satisfied from the evidence that the court below ²⁷⁴ was not in error in finding that the contract as last drawn was substantially complied with.

2. We think there is no force in the claim that no lien could attach by reason of the insufficiency of description of the premises in the contract. The land upon which the building was constructed was the only land owned by Mr. and Mrs. Rice in Oxford, Oakland county. The building, it is conceded, was constructed upon the identical land contemplated by the contract, and the claims of liens filed described those lands. It

was not necessary, in the bill, to ask a reformation of the contract by inserting the proper description of the land therein. All parties acquiesced in the construction of the building there, and there is no claim of mistake of the place where it was to be constructed. It is not the case cited by counsel for defendants, of *Burkhart v. Reisig*, 24 Ill. 529. There an engine was to be built and set up in the city of Chicago. It was not contemplated by the parties that the engine should be attached to any particular piece of land, and no arrangement of that kind was made, while in the present case this building was to attach to and become a part of this particular land, as a part and parcel of the real estate of defendants Rice.

3. The principal question argued and insisted upon here to defeat the liens is in reference to the homestead interest of Mrs. Rice. She did not sign the contract, but it appears from the testimony of Mr. Slater that she knew of the making of a contract for the erection of the building, and she herself testified: "My husband and I talked over the building we would build, and he drew some plans on paper and showed me. . . . Whatever he did in the matter had my sanction."

She was present when Slater was there and the contract was talked over. She knew the building was to be placed on this lot, and her husband testified that he told her he had signed the contract with Mr. Slater. Section 2 of the lien law of 1891 provides that: ²⁷⁵ "If any such services are performed or materials are furnished upon lands belonging to any married woman, with her knowledge and consent, in pursuance of a contract with the husband of such married woman, the person furnishing such labor or materials shall have a lien upon such property the same as if such contract had been made with such married woman. And in case the title to such lands upon which improvements are made is held by husband and wife jointly, the lien given by this act shall attach to such lands and improvements, if the improvements be made in pursuance of a contract with both of them, or in pursuance of a contract with one of them by and with the knowledge and consent of the other."

We think the testimony fairly shows that the contract was made with the knowledge and consent of Mrs. Rice, within the meaning of this statute.

But counsel for defendants Rice contend that this was a homestead, and therefore protected from levy and sale by section 2, article 16, of the constitution of this state, and that

the lien statute above referred to can have no effect to deprive the wife of her homestead interest, as she did not sign the contract; that, the parties having purchased this land with the intention of making it their homestead, their homestead rights attached. Counsel cite the following cases in which it is claimed that such a rule is laid down: In *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594; 16 N. W. 895, it appeared that a bill was filed to protect a homestead right, and to enjoin a threatened sale on execution. The complainant, a single man at the time, purchased the lot, intending to make it a homestead. He was anticipating marriage, and shortly after the purchase was married. The parties commenced improving the property. They built a barn and shed, dug a well, and kept stock on the place. In the spring of 1881 they talked with a builder about building a house. The cost of the house was such that they delayed for a time about building, but all the money they earned was put into improvements on the lot. It was toward the end of 1882 before they were able to put up a house. In November, 1882, an execution was levied. It was said by the court: ²⁷⁶ "The lot, as has been said, was procured for the purposes of a home; and complainant, aided by the industry and frugality of his wife, was proceeding to make it such as rapidly as their limited means would permit. They inclosed it, they had their domestic animals upon it, they came to live in the immediate vicinity, they made a well, and they put up outbuildings. Everything but the dwelling proper had been erected before the levy was made, and complainant was bargaining with a builder for a house. . . . They did not as yet sleep upon it or take their meals upon it, and, probably, if they had done this in some of the buildings already constructed, their right to claim a homestead would not have been disputed." This was held to be a homestead in fact.

In *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852, 31 N. W. 533, it was said: "A city lot purchased with the intention of making it a homestead for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser incloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit."

The case of *Mills v. Hobbs*, 76 Mich. 122, 42 N. W. 1084, is very similar to the present case. The premises were purchased by one Nettie Hobbs, with the intention of occupying them as a homestead with her husband. The lot was unimproved and vacant. In the spring of 1888, Mrs. Hobbs caused some shade trees to be planted in front along the street line. In August she contracted with one McCartney for the erection of a dwelling-house on the lot. McCartney sublet part of the contract verbally to the plaintiffs, who were masons by trade. The contract with McCartney was entered into by Mrs. Hobbs through her husband. The plaintiffs completed the work as subcontractors, and subsequently filed their claim of lien within the time provided by the lien law. The premises were ²⁷⁷ held to be the homestead of Mrs. Hobbs, and the lienors, it was said, had no claim under the statute. The court said: "It is the fact of it being a homestead or not that determines the right of lien. If the plaintiffs in this suit entered into the contract with McCartney, relying upon their right of lien instead of the personal responsibility of McCartney, it was open to them to require a contract in writing before performing any labor or furnishing any material; and, neglecting that, they have no lien under the statute."

Under these cases, it is apparent that the defendants Rice were entitled to claim a homestead in these premises. The very contract entered into with Slater shows that a part of the building was to be occupied as a dwelling by Rice and his wife. It was their intention to make it a homestead, and Slater must have so understood at the time, if he read the contract. He did not obtain the wife's signature to the contract. The statute cited cannot be held valid to cut off the homestead rights of the wife in the land. In order to cut off her rights, she must have signed the contract. While, perhaps, the statute is broad enough to cut off such rights if the contract was entered into with her knowledge and consent, yet the homestead exemption is provided for by the constitution, and it is only by some promise in writing signed by her that her homestead right can be interfered with.

But subdivision 4 of section 9 of the lien law of 1891, as amended, provides, however, that: "The liens for such labor or materials furnished, including those for additions, repairs, and betterments, shall attach to the building . . . for which they are furnished or done, in preference to any prior title, claim, lien, encumbrance, or mortgage to or upon the land upon which

such building belongs or is put. If such materials were furnished or labor performed in the erection or construction of an original or independent building, ... commenced since the attaching or execution of such prior title, ... the court may, in its discretion, order and direct such building to be separately ²⁷⁸ sold under its decree, and the purchaser may remove the same within such reasonable time as the court may fix; but if, in the discretion of the court, it should not be separately sold, the court shall take an account and ascertain the separate values of the land and the building, ... and distribute the proceeds of the sale so as to secure to the prior title priority upon the land, and to the mechanic's lien priority upon the building. . . . If the material furnished or labor performed be for betterments, ... the court shall take an account of the value before such materials were furnished or labor performed, and the enhanced value caused by such betterments, and, upon the sale of the premises, distribute the proceeds of sale so as to secure to the prior title priority upon the land and improvements to the amount as they existed prior to the commencement of the improvements, and to the lien priority upon the enhanced value caused by such betterments."

These provisions of the statute apply with great force to such a case as the present. Mrs. Rice has a title which is not affected by the contract made with the husband. The building is an original one erected by the contractor. Under this subdivision, his lien attaches to the building, though it cannot affect the title of Mrs. Rice to the land itself. The case will be remanded to the court below to take an account of the value of the land without the building, and also the enhanced value with the building thereon. While no sale can be made of Mrs. Rice's homestead, yet the court has power to permit the contractor and materialmen to remove the building therefrom, and thus dispose of it.

The complainant will recover costs of the court below against defendants Rice. Neither party will recover costs of this court.

The other justices concurred.

MECHANIC'S LIEN.—THE DESCRIPTION of a building in a notice of a mechanic's lien is sufficient if it enables a person familiar with the locality to identify the building as the only one corresponding with such description: *Hughes v. Torgerson*, 96 Ala. 346, 38 Am. St. Rep. 105, 11 South. 209; *Maynard v. East*, 13 Ind. App. 432, 55 Am. St. Rep. 238, 41 N. E. 839.

MECHANIC'S LIEN.—A HOMESTEAD is not subject to a mechanic's lien: *Morgan v. Beuthein*, 10 S. Dak. 650, 66 Am. St. Rep. 733, 75 N. W. 204. See, further, the monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 383-389; *Nickerson v. Crawford*, 74 Minn. 366, 73 Am. St. Rep. 354, 77 N. W. 292.

PETER v. CHICAGO AND WEST MICHIGAN R. R. CO.

[121 Mich. 324, 80 N. W. 295.]

RAILROADS—LIABILITY FOR SETTING FIRES—APPROVED APPLIANCES.—Under a statute relieving a railroad company from liability for fire set by a locomotive engine whose machinery, smokestack, or fire-boxes are in good order and properly managed, and if all reasonable precautions are taken, the company is not liable upon proof that the appliances used to prevent or limit the escape of sparks and fire are of such pattern as are in common use by careful, experienced, and prudent railroad operators in that kind of business at that time.

RAILROADS—LIABILITY FOR SETTING FIRES.—A railroad company is under obligation to use the same degree of care to prevent setting out fire from its locomotives on a branch line running into a lumber district as it is on other points on its road.

RAILROADS—LIABILITY FOR SETTING FIRES.—CONTRIBUTORY NEGLIGENCE is not available as a defense under a statute fixing the liability of railroad companies for fires set out by their locomotives, unless such defense is expressly enumerated therein.

RAILROADS—LIABILITY FOR SETTING FIRES—NEGLIGENCE OF PLAINTIFF.—If lumber is burned by fire, set out by a locomotive engine, the fact that the lumber was piled eight feet from the track is not such an act of negligence as prevents the owner from recovering for its loss.

RAILROADS—LIABILITY FOR SETTING FIRES—INSURED PROPERTY.—The fact that lumber burned by fire set out by a locomotive engine was insured at the time of loss does not affect the owner's right to recover from the railroad company.

Bunker & Carpenter and R. W. Barger, for the appellant.

F. A. Nims and W. A. Smith, for the appellee.

325 MONTGOMERY, J. This action is brought to recover the value of a large quantity of lumber belonging to the plaintiff, which was consumed by fire occurring on the 18th of November, 1893, which fire is claimed to have had its origin in sparks emitted from an engine on defendant's road. The lumber was manufactured for the plaintiff by Horning & Hart, who owned a mill at Keno, a place between three and four miles

north of Woodville, a station on the defendant's Big Rapids branch. The track into Keno was built by defendant at its own cost, except for right of way, and was originally used exclusively for the purpose of taking out the plaintiff's lumber. Later the defendant extended the track to reach other mills farther north, owned by other parties. The evidence of plaintiff tended to show that the engine used on the road set out the fire, which destroyed over seven million feet of plaintiff's lumber, valued at over ninety thousand dollars; that the engine used was of an old pattern, known as the diamond-stack pattern, not in common use. The defendant's testimony tended to show that the engine was in good order, of a design in common use, and entirely serviceable. The defendant also offered testimony tending to show that the lumber where the fire started was piled but eight feet from the track, and that provisions for putting out fire were wanting. The jury found for the defendant, and the plaintiff brings error.

320 Numerous questions are presented in the brief of the plaintiff's counsel, the more important being whether the court laid down the correct rule as to the negligence of defendant; whether the court erred in submitting the question of plaintiff's contributory negligence to the jury; and whether there was error in allowing comments of counsel as to the relation of certain insurance companies to the case, it appearing that the lumber had been insured.

1. The statute defines the extent of liability of railroad companies, and, in determining the question of defendant's duty, reference to the statute is essential. Section 3378 of 1 Howell's Statutes reads as follows: "Any railroad company building, owning, or operating any railroad in this state shall be liable for all loss or damage to property by fire originating from such railroad, either from engines passing over such roads, fires set by company employes by order of the officers of said road, or otherwise originating in the constructing or operating of such railroad; provided, that such railroad company shall not be held so liable if it prove to the satisfaction of the court or jury that such fire originated from fire by engines whose machinery, smokestack, or fire-boxes were in good order and properly managed, or fires originating in building, operating, or repairing such railroad, and that all reasonable precautions had been taken to prevent their origin, and that proper efforts had been made to extinguish the same in case of their extending beyond the

limits of such road, when the existence of such fire is communicated to any of the officers of such company."

It will be noted that the character of the engines to be used is not defined, although it is required that, to relieve the company from liability for fires, the engines, etc., must be shown to be in good order and condition. It is not open to question that under this statute, on the plaintiff's showing the fact of the fire from the defendant's locomotive, the burden is cast upon the defendant to show that the locomotive was in good order and condition, and properly managed. The court in this case so charged. The plaintiff claims, however, that the court did not lay down the correct rule as to the character of the engine required ³²⁷ in order to relieve the defendant. The court charged upon this subject as follows: "The railroad company is exonerated from liability under the statute if the appliances it has used to prevent or limit the escape of sparks and fire from the locomotive are such as have been in common use for a long time for that purpose, and have substantially guarded against the danger sought to be avoided. . . . If you should find that this defendant used this engine, and it was of such a pattern as was in common use by careful, experienced, and prudent railroad operators, and such as they would use and did use for this kind of business at that time, why that is all that is necessary for this defendant to do, so far as the quality of the engine is concerned."

We think the charge of the circuit judge correctly stated the rule as established in this state in *Hagan v. Chicago etc. R. R. Co.*, 86 Mich. 615, 49 N. W. 509. As was said in that case: "Two or more kinds of appliances may be used, each one of which is approved by a number of railroad companies which are managed by practical and prudent men, and the adoption of each may have been after careful consideration of the merits of all; yet, unless that adoption and approval has some weight, there is no safety in the use of either."

Under the instruction given, the jury were not authorized to find that it was proper to use a character of locomotive which had been generally displaced by better appliances. The only doubtful expression in the charge was the reference to "use for this kind of business." If this were understood to mean that a less degree of care was required in this service than in the ordinary business of the company, it was not proper, as we think the company was bound to use the same degree of caution at this place as at other points on the road.

2. The case presents a question of exceeding importance and interest, which is whether the plaintiff's contributory negligence is a bar to recovery under this statute. This question was mooted in *Briant v. Detroit etc. R. Co.*, 104 Mich. 307, 62 N. W. 365, but, as its decision was not necessary to a ³²⁸ determination of the case, it was not settled. The authorities bearing directly upon the subject are not numerous, but, as we read them, they are harmonious. The question of the effect of plaintiff's contributory negligence has arisen in three classes of cases: 1. Where the liability of defendant rests upon the common law; 2. Where the liability of the company for fires set out by its locomotives is made absolute by statute; 3. Where, as in this state, such liability is limited by the statute itself.

In the first class of cases, the contributory negligence is a defense; in the second class, the liability of the company is absolute, and the contributory negligence of the plaintiff is not a defense: 3 *Elliott on Railroads*, sec. 1238. This case falls within the third class. The statute creates an absolute liability for all loss or damage to property by fire originating from engines, etc., with a proviso that the company shall not be liable if it proves certain facts enumerated, among which is not the contributory negligence of the plaintiff.

In the case of *Laird v. Railroad*, 62 N. H. 254, 13 Am. St. Rep. 564, the supreme court had under consideration a statute of Vermont which read: "When any injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients, to prevent such injury": Vt. Gen. Stats. 1862, c. 28, sec. 78.

The court held that the contributory negligence of plaintiff did not constitute a defense, under this statute. The decision was rested upon two grounds: 1. The analogy of the Vermont decisions holding that the contributory negligence of the owner of animals killed or injured by a railroad company which had not fenced its tracks constituted no defense; and 2. That the fair construction of ³²⁹ the statute led to the result reached. The court said: "The statute expressly declares in what cases the corporation shall be relieved from liability, and no other defense is recognized, except showing 'that they have used all due caution and diligence, and employed suitable expedients, to pre-

vent the injury," and held that the rule "*Expressio unius est exclusio alterius*" applied.

It will be readily seen that the case cited is directly in point, and that both grounds upon which the case rested may be urged with equal force in this state; for not only is there the same room for the application of the rule "*Expressio unius est exclusio alterius*," but we have also held in this state that the defense of contributory negligence is not available in an action under the preceding section of our statute (1 Howell's Stats., sec. 3377), which provides that the company shall be liable for damages done to cattle, etc., in case of a failure to fence its tracks: *Flint etc. Ry. Co. v. Lull*, 28 Mich. 510; *Neversorry v. Duluth etc. Ry. Co.*, 115 Mich. 146, 73 N. W. 144. The reasoning of the court in *Laird v. Railroad*, 62 N. H. 254, 13 Am. St. Rep. 564, is convincing, and seems to us unanswerable. To reach any other conclusion, we must interpolate into the statute words not found there, and create an additional ground for exemption. The contention of appellant is also sustained by numerous cases which hold that, under a statute fixing the liability of a railroad company for fires set out by its locomotives, the defense of contributory negligence is not available. Of this class are *Rowell v. Railroad*, 57 N. H. 132, 24 Am. Rep. 59; *West v. Chicago etc. Ry. Co.*, 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512; *Union Pac. Ry. Co. v. Arthur*, 2 Colo. App. 159, 29 Pac. 1031. As is stated by the learned author in 3 Elliott on Railroads, section 1238, there may be cases in which, after the property is set on fire by a railroad company, the owner, by a slight effort, could save it from destruction, and that such cases should be subject to a different rule. In such case, it might be said with much force that the damage does not directly result from the fire. But in this case we are dealing with the alleged precedent negligence of plaintiff, ³³⁰ and must hold that the defense is not available under the statute.

If the defense were available in any case, we should also be of opinion that no such act of negligence was shown in piling the lumber eight feet from the track: See *Stacy v. Milwaukee etc. Ry. Co.*, 85 Wis. 225, 54 N. W. 779; *Fero v. Buffalo etc. R. R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178. We have not overlooked the cases cited by defendant's counsel. The case of *Ross v. Boston etc. R. R. Co.*, 6 Allen, 87, is negative authority. The court did not go out of its way to disapprove the holding of the court below. If it be treated as affirming the doctrine

contended for, it is at variance with the New Hampshire and Iowa cases. The opinion in *Murphy v. Chicago etc. Ry. Co.*, 45 Wis. 222, 30 Am. Rep. 721, is able and exhaustive, but, so far as the case discloses, it rests on the common-law doctrine of negligence. We have been cited to no statute of Wisconsin, nor have we been able to find any, in force when the action in *Murphy's* case arose, which bears on the subject. The case is not, therefore, an authority which aids us in placing a construction on our statute.

3. The fact appeared on the trial that the lumber consumed was insured. This did not affect the plaintiff's right to recover: *Perrott v. Shearer*, 17 Mich. 48; *Hagan v. Chicago etc. R. R. Co.*, 86 Mich. 619, 49 N. W. 509. Obviously, therefore, the comment as to the amount of capital stock of the insurance company was untimely, and should have been omitted. We need not determine whether this comment was damaging error not cured by the charge, as the case must go back on other grounds.

Judgment reversed and new trial ordered.

Hooker and Moore, JJ., concurred with Montgomery, J.

MR. CHIEF JUSTICE GRANT dissented, and Mr. Justice Long concurred therein, to the effect that the statute mentioned in the principal opinion did not abrogate the rule of the common law, that he whose negligent act contributes to his own injury cannot recover damages from another whose negligence contributed to such injury. In the course of his remarks Judge Grant said:

"The statute does not change the rule of the common-law liability for negligence. That rule of liability remains the same. If the defendant can show that it has exercised due care in the construction and management of its engines, the defendant is not liable. This has always been the rule, and the statute does not affect it. It was found difficult, and in many cases impossible, for the plaintiff to show what caused the fire to escape from the engine. Its construction and management were exclusively within the knowledge of the company. The reason and reasonableness of a law which would shift the burden of proof to those who had exclusive knowledge on the subject, and exclusive control and management of the machine which caused the damage, are apparent. Did the legislature intend to go further? It has not expressly done so. In order to sustain the contention of the plaintiff, we must find that it has done so by implication. Repeals of statutes by implication are not favored. Only when effect cannot be given to both statutes do courts hold that the latter repeals the former. If both can stand and be given any effect, courts have

universally held that there is no repeal. In my judgment, the same rule should be applied in the construction of a statute claimed to abrogate a wise and beneficent rule of the common law. If both can stand and be given effect, both should be sustained. Applying that rule to the case before us, I do not think that the common-law rule is abrogated. There is nothing in this law to indicate that the legislature intended to abrogate the rule as to contributory negligence which was the settled law when the act was passed. Had it so intended, apt words to carry out such intention would naturally have been used. It is fair to infer that the legislature had in mind solely the injustice of the common-law rule as to the burden of proof, as applied to cases of this character. The decisions upon this subject are not harmonious, even under statutes which are somewhat similar to ours. In such case, authorities are of but little weight, and other courts must decide the case upon their own statutes, and upon what seems to them the correct rule of law. . . . Elliott recognizes that the decisions are not in harmony, even where there are no statutory provisions, and, after stating that where statutes impose an absolute liability, the question of the owner's contributory negligence is immaterial, says: 'We do not believe, however, that such a strict rule, even where there is an absolute statutory liability, is entirely just': Elliott on Railroads, sec. 1238. This statement of the learned author is only material in showing the care courts should exercise in determining whether the statute abrogated this defense. Under the rule claimed, a party may sit back, and deliberately see his property destroyed, when by slight exertion he could arrest the fire. So he may leave hay or other combustible material along the defendant's right of way, at a farm crossing or elsewhere, in a dry time, and recover damages if the combustible material takes fire from an engine. Many other illustrations will readily suggest themselves. Such a rule is unjust, and courts ought not to hold that the legislature intended to establish it, unless the language leaves no other conclusion possible. It is sought to apply the rule 'Expressio unius est exclusio alterius.' I do not think this a case for the application of that rule. The legislature did not pretend to deal with the question of contributory negligence, but was dealing solely with the negligence of railroad companies.

"2: Was there evidence of contributory negligence? The jury, in reply to special questions, found that the lumber was piled so close to the track that cars in passing struck the ends of the piles, and that a communication was addressed by the defendant company to the agents of plaintiff upon the subject of this dangerous proximity. Barrels of water kept upon the tops of the piles for use in putting out incipient fires had been emptied, although there was at the time no danger of their freezing up. One witness testified that he looked for pails with which to get water to put out the fire, but they had been taken away, and the barrels were empty.

He also testified that with two pails of water he could, in his judgment, have put the fire out when it was first discovered. This testimony, in my judgment, made the question one of fact to be determined by the jury. Counsel cite cases where buildings, built near the right of way, were burned. The courts properly hold that their erection was a legitimate use of one's own property, of which the owner could not be deprived, and that in running their trains past them the railroads were held to a greater degree of care. These cases have no application where the use is merely temporary, and there was no occasion for piling inflammable material so near the track for the mere convenience in loading. I think the question of contributory negligence was properly submitted to the jury."

RAILROADS—FIRES CAUSED BY.—It is the duty of a railway corporation to supply itself with such engines as will be least liable to set fire, and be reasonably safe from destroying the property of others along its line: *Watt v. Nevada Cent. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 726. As affecting the company's liability for damages caused by fire from its locomotives, the negligence of the owner of the property is immaterial: *Rowell v. Railroad*, 57 N. H. 132, 24 Am. Rep. 59.

RAILROADS—FIRES—INSURANCE.—If by the negligence of a railroad company fire escapes from its right of way and consumes adjoining property, the owner can recover his entire loss from the company without regard to the amount of insurance he may have been paid thereon: *Lake Erie etc. R. R. Co. v. Griffin*, 8 Ind. App. 47, 52 Am. St. Rep. 465, 35 N. E. 396.

ATKINSON v. DOHERTY.

[121 Mich. 372, 80 N. W. 235.]

INJUNCTIONS—USE OF LABEL.—The use of the name and likeness of a deceased person as a label for a certain brand of cigars named after him cannot be restrained by injunction, so long as they do not constitute a libel.

E. G. Stevenson, L. M. Butzel, and O'B. J. Atkinson, for the appellant.

J. H. Pound, W. N. Choate, and J. Whelan, for the appellee.

³⁷² **HOOKEE, J.** The late Colonel John Atkinson was a well-known lawyer and politician. After his death, the defendant, a manufacturer of cigars, brought out an article that it named the John Atkinson cigar, and sought to put it upon the market under a label bearing that name and a likeness of Col-

onel John Atkinson. The widow of Colonel Atkinson filed a bill to restrain this, and upon the hearing the circuit court made a decree dismissing the bill with costs, and the complainant has appealed.

As a rule, names are received at the hands of parents—surnames by inheritance, and Christian names at their will. But this is not an invariable rule, for many names are adopted or assumed by those who bear them. But in ³⁷³ neither case is the right to the use of a name exclusive. A disreputable person or criminal may select the name of the most exemplary for his child, or for his horse or dog or monkey. We have never heard this questioned. No reason occurs to us for limiting the right to apply a name, though borne by another person, to animate objects. Why not a John Atkinson wagon, as well as a John Atkinson Jones or horse or dog? Society understands this, and may be depended upon to make proper allowances in such cases; and although each individual member may, in his own case, suffer a feeling of humiliation when his own name or that of some beloved or respected friend is thus used, he will usually, in the case of another, regard it as a trifle. We feel sure that society would not think the less of Colonel John Atkinson if cigars bearing his name were sold in the shops. Nor are his friends brought into disrepute thereby. So long as such use does not amount to a libel, we are of the opinion that Colonel John Atkinson would himself be remediless, were he alive, and the same is true of his friends who survive.

It is urged in this case that the connection of the name with cigars wounds the feelings of the widow, and extreme and improbable illustrations of the possibilities of a rule which should permit the indiscriminate use of names of deceased persons are given. We appreciate the indelicacy of the man who should join the funeral procession of Colonel John Atkinson in a carriage bearing the legend, "The Colonel John Atkinson cigar," and we can readily understand that it would annoy the friends of the deceased. The sentiment which prompts the feeling of annoyance at such an act is aroused by any aspersion of the dead. It is natural and commendable, as are all recognitions of the proprieties of life; but it does not follow that such an act is an actionable wrong, or that equity will intervene by injunction to prevent it, though we are quite sure that the disapproval of society would ordinarily have the latter effect.

Stress is laid upon the fact that the picture of Colonel John Atkinson ³⁷⁴ is to be displayed upon this label. It is claimed

that a man has no right to print and circulate pictures of another, except by his consent, or where, by reason of his celebrity, the public has an interest in him. This is a proposition of modern origin, and is said to have the support of some cases. We will examine the authorities that have been cited, and such as we have been able to find.

In the January, 1869, *Law Register* (volume 8, New Series, page 1), is an article devoted to a discussion of "The Legal Relations of Photographs," in which the writer expresses the opinion that if a photograph clandestinely taken, and representing its original in a ridiculous light, or publishing his personal defects, were uttered maliciously, to his damage, it would doubtless be a libel in all of the states, and particularly in those in which the old maxim, "The greater the truth, the greater the libel," is still in force. That it would be a libel, if a true picture, in states where the truth may be shown in defense, is not so clear as it may seem; but there is no want of harmony in the decisions upon the proposition that a picture may be libelous. The author mentions the case of an Austrian lady of rank who recovered damages from her photographer for selling copies of her photograph as that of some notorious woman in another city. He says, "What was the ground or the nature and extent of recovery we are not told"; and adds that, if no special damage were found, it could not be doubted that "her right to control the market of her own beauty could not have been denied her by any court, and that she must have recovered on the ground that that right had been infringed, if on no other." We are at a loss to know just what is meant by this. If only that, having produced or caused to be produced a negative and photograph of herself, it was, like private writings, entitled to protection; it has the semblance of support by a number of cases. But if it is meant that no person has, without permission, the right to have or sell pictures of another, it is a different proposition, and we know of no case decided by a court of last resort that so holds.

³⁷⁵ In 1890, prominence was given to this subject by an article in 4 *Harvard Law Review*, 193, entitled, "The Right to Privacy," in which the writers urge the "right to be let alone," and the necessity for the protection of citizens against invasions of their domestic affairs through the newspaper, the camera, and numerous mechanical devices, "which [they say] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops.'" The right to

privacy in a broader sense than before known to the common law is asserted. The article cites a number of cases, some of them relating to pictures, and criticises the courts for basing their decisions upon property or contract rights. These cases relate to letters, diaries, and other private writings, paintings, sculptures, music, etc. In this connection the case of *Prince Albert v. Strange*, 1 Macn. & G. 25, is cited, wherein the defendant was restrained from publishing some etchings made by their majesties, the king and queen. The burden of the article is to establish a right of privacy which shall be recognized and protected by the courts, and it is urged that "in such right, as in the right not to be assaulted or beaten (i. e., the right to be let alone)," there inheres the quality of being owned or possessed; and, as that is the distinguishing attribute of property, there may be some propriety in speaking of those rights as property, though it is admitted that they bear little resemblance to what is ordinarily comprehended under that term. Notwithstanding the unanimity of the courts in resting the decisions adverted to upon property rights, the authors assert that "it is in reality not the principle of private property, but that of an inviolate personality."

An examination of the article will show that authoritative decisions which support the theory advocated are wanting. Among them are several cases involving pictures: *Prince Albert v. Strange*, 1 Macn. & G. 25; *Tuck v. Priester*, L. R. 19 Q. B. Div. 629; *Pollard v. Photographic Co.*, L. R. 40 Ch. Div. 345. But these are ³⁷⁶ based upon property or contract rights, as these terms are commonly understood. At the time of the writing of this article, the case of *Manola v. Stevens* was pending in a court at New York. An actress sought to restrain the publication of a picture of herself taken surreptitiously while she was performing her role upon the stage. It was not contested, however, and we are not advised that it was reported: See *New York Times* of June 15, 18, 21, 1890. The *Manola* case, and the article in the *Harvard Law Review*, were soon followed by another case. In June, 1892, the case of *Schuyler v. Curtis*, 64 Hun, 594, 19 N. Y. Supp. 264, involving a preliminary injunction only, was decided in the first department of the supreme court of New York, affirming the decision of the district court, reported in 27 Abb. N. C. 387; 15 N. Y. Supp. 787. An unincorporated society, connected with which was Miss Susan B. Anthony, arranged to place a life-size statue of Mrs. G. L. Schuyler, to be designated "The Typical Philanthropist," upon exhibition at the World's

Fair, soon thereafter to be held in Chicago. This was enjoined by her relatives, and, upon a motion an opinion was written that goes the length for which the complainant's counsel in this case contend: *Schuyler v. Curtis*, 64 Hun, 594; 19 N. Y. Supp. 264. The case was afterward heard, and a decree in accordance with the prayer of the bill entered: See *Schuyler v. Curtis*, 30 Abb. N. C. 376; 24 N. Y. Supp. 509.

Meantime the case of *Marks v. Jaffa*, 6 Misc. Rep. 355, arose. This also was a New York case, and is reported in 26 N. Y. Supp. 908. The defendant devised the scheme of publishing in his newspaper a picture of two actors, with an invitation to the readers of the newspaper to vote, with a view to determining who was the more popular of the two. The complainant declined to consent, yet a publication was made, when the bill was filed to restrain it. The injunction was granted, apparently on the strength of *Schuyler v. Curtis*, 64 Hun, 594; 19 N. Y. Supp. 264.

Another case arose before the final disposition of the *Schuyler* case, viz., *Corliss v. Walker*, 57 Fed. 434. It ³⁷⁷ was a bill filed in the federal circuit court of Massachusetts by the widow and children of Mr. Corliss, celebrated as the builder of the great engine exhibited at the Centennial Exposition held at Philadelphia, to restrain the publication of a biography and picture of himself. It was based distinctly upon the ground taken in the article published in the *Harvard Law Review*, viz., that it was an invasion of the right of privacy, and it was insisted that a court of equity should protect such right. Apparently the case of *Schuyler v. Curtis*, 27 Abb. N. C. 387, 15 N. Y. Supp. 787, was relied upon, for in the opinion it was said to be not in point, as it did not involve a publication. The court said, among other interesting things, that:

"In the first place, I cannot assent to the proposition that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public character (a distinction often difficult to define) is not important in this case. Freedom of speech and of the press is secured by the constitution of the United States and the constitutions of most of the states. This

constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or by its falsehood and malice may injuriously affect the standing, reputation, or pecuniary interests of individuals: Cooley's Constitutional Limitations, 6th ed., 518. In other words, under our laws one can speak and publish what he desires, provided he commits no offense against public morals or private reputation. . . .

"There is another objection which meets us at the threshold of this case. The subject matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests: *In re Sawyer*, 124 U. S. 200, 378 210, 8 Sup. Ct. Rep. 482; *Kerr on Injunctions*, 2d ed., 1. It follows from this principle that a court of equity has no power to restrain a libelous publication: *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310; *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368. The opinion of Vice-Chancellor Malins in *Dixon v. Holden*, L. R. 7 Eq. 488, to the contrary, is disapproved by Lord Chancellor Cairns in *Prudential Assur. Co. v. Knott*, 10 Ch. App. 142. In *Kidd v. Horry*, 28 Fed. 773, Mr. Justice Bradley, in speaking of *Dixon v. Holden*, L. R. 7 Eq. 488, and several recent English cases, declares that they depend upon certain acts of parliament, and not on the general principle of equity jurisprudence. . . .

"As to the picture which accompanies the published sketch, the case stands on a different footing. The defendants obtained from the plaintiffs a copy of a portrait and a photograph of Mr. Corliss, from which they have made two plates, one of which they propose to insert in the publication. But it appears from the evidence that these pictures were obtained on certain conditions, which the defendants have not complied with. This matter directly concerns the exclusive right of property which the plaintiffs have in the painting and photograph, and it would be a violation of confidence, or a breach of contract between the parties, to permit the defendants, under these circumstances, to use either of the plates: *Pollard v. Photographic Co.*, L. R. 40 Ch. Div. 345; *Prince Albert v. Strange*, 1 Macn. & G. 25. The injunction is denied as to the publication, and granted as to the use of the plates."

Subsequently a motion to dissolve the injunction was granted upon the ground that the deceased was a public character, and the public entitled to use his picture. Colt, J., said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property, as well as a personal, right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk: *Duke of Queensberry v. Shebbeare*, 2 Eden, 329; *Gee v. Pritchard*, 2 Swanst. 379 402; *Folsom v. Marsh*, 2 Story, 100; *Abernethy v. Hutchinson*, 3 L. J. Ch., O. S., 209; *Caird v. Sime*, 12 App. Cas. 326; *Tipping v. Clarke*, 2 Hare, 383, 393; *Williams v. Assurance Co.*, 23 Beav. 338. In the case of *Prince Albert v. Strange*, 1 Macn. & G. 25, 2 De Gex & S. 652, this doctrine was extended so far as to prohibit the publication of a catalogue of private etchings. But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself; but, where an individual becomes a public character, the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public. When anyone obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the right to reproduce it, whether in a newspaper, magazine, or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters": *Corliss v. Walker*, 64 Fed. 280.

We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that because he permits his picture to be published by one person, and for one purpose, he is forever thereafter precluded from

enjoying any of his rights. Just when a man becomes a benefactor of the public, so as to have this effect, is not stated; but we see no reason for so treating Mr. Corliss, to the exclusion of myriads of people who, in a modest but effective way, perform public duties, or philanthropic acts or functions in which the public are interested. We think the result reached in the Corliss case was right, though we cannot adopt the views expressed in the second opinion: See *Corliss v. Walker*, 64 Fed. 280, 31 L. R. Ann. 283, and note.

³⁸⁰ We will return to the case of *Schuyler v. Curtis*, 64 Hun, 594; 19 N. Y. Supp. 264. In 1895 the court of appeals reversed the decree: See *Schuyler v. Curtis*, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22. It was there held (Mr. Justice Peckham writing the opinion, in which all concurred except Mr. Justice Gray) that "a woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts, or statues of her to commemorate her worth or services, does not survive her, so that it can be enforced by her relatives." The decision was put upon the ground that the proposed act could not reasonably be supposed to injure the feelings of anyone. The case does not dispose of the existence of the alleged actionable "right of privacy," but, upon the theory of such a right, finds that the plaintiff had not established a case for the intervention of equity; and we think it should not be considered as containing even a dictum in support of the doctrine contended for.

In April, 1894, a case was decided involving pictures, viz., *Murray v. Gast etc. Engraving Co.*, 31 Abb. N. C. 266, 28 N. Y. Supp. 271, it was held that: "A parent cannot maintain an action to enjoin the unauthorized publication of the portrait of an infant child, and for damages for injury to his sensibilities caused by the invasion of his child's privacy; for the law takes no cognizance of a sentimental injury, independent of a wrong to person or property. Nor can such suit be maintained upon the ground that the plaintiff had caused the portrait to be painted, and that the publication is an invasion of his proprietary rights, where it appears that he had given the portrait to his wife."

A full and learned discussion of the authorities relating to the right of recovery for an injury to feelings is found in the case of *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, Mr. Justice Lumpkin writing the opinion. It is not our purpose to quote at length from the

opinion, which can as well be read. In discussing the Texas rule, which permits such actions, the learned jurist shows how the law may be made uncertain by adopting ³⁸¹ the opinions of law-writers which have not the authority of adjudicated cases behind them. There is perhaps no more dangerous practice than that, unless it be the kindred one of basing a legal principle upon a dictum. The opinion of Mr. Justice Lumpkin contains the most convincing discussion of this subject that we have seen.

In volume 24 of the Solicitors' Journal and Reporter, page 4, will be found an article which indicates that in England it was found necessary to protect the right to control photograph pictures by statute, for the reason that the common law did not afford such protection.

We may search the law books published before 1860 in vain for the assertion of any such right as that claimed, or the denial of the right to publish the truth, for any lawful purpose and in a decent manner, either orally, in writing, or by pictures. What is a picture? It is one of the ways of representing a person or thing. It attempts imitation, rather than description. Pictures antedated letters, and their use was probably one of the earliest methods of communicating thought and perpetuating events. Pantomime and pictures are intelligible to all people, while the same cannot be said of written or even spoken language. This generation owes much to the picture writing of the ancient Egyptian priests. It is a pleasure to look upon a picture, but it is not alone because it is the picture of a friend. Crowds travel far to see men of celebrity or notoriety. We learn of places and things from pictures. They impart information to those who cannot or will not read, and many times more rapidly and effectually than written description would do to those who can and will. The picture is to-day an important extension of alphabets, which for a time largely superseded their use; and, if written language were to be deprived of their aid, literature would receive a serious blow. When it can be used, the picture is a much more satisfactory method than the use of the alphabet alone of conveying an understanding of material objects, animate and inanimate. We are not satisfied that the homes and landscapes ³⁸² are so entirely within the control of owners that one commits an unlawful invasion of the right of privacy in looking upon their beauties, or by sketching or even photographing them, or that one has a right of action either for damages or to restrain the

possessor of a camera from taking a snapshot at the passer-by for his own uses. If we admit the impertinence of the act, it must also be admitted that there are many impertinences which are not actionable, and which courts of equity will not restrain. As the right alleged is not a property right, and does not spring from any contract, it must follow that relief must be in an action for damages for a breach of duty upon an actionable wrong, or a suit to prevent a threatened injury. In either case such action must be based upon an act done or threatened which the law looks upon as a tort; and, if the act complained of is one which is not in the law denominated a wrong, there is no legal remedy.

All men are not possessed of the same delicacy of feeling, or the same consideration for the feelings of others. These things depend greatly upon the disposition and education. Some men are sensitive, some brutal. The former will suffer keenly from an act or a word that will not affect the latter. Manifestly, the law cannot make a right of action depend upon the intent of the alleged wrongdoer, or upon the sensitiveness of another. Although injuries to feelings are recognized as a ground for increasing damages, the law has never given a right of action for an injury to feelings merely. Slander and libel are based upon an injury to reputation, not the feelings; and although many offensive things may be said that injure feelings and shock and violate the moral sense, even though they be untruthful, they are not necessarily actionable. To make them so, they must be of such an atrocious character that the law will presume an injury to reputation, or special damage to property interests must be alleged and proved. What becomes of the innumerable cases of ill-natured and perhaps insulting and immoral ³⁸³ things that may be said about persons? The answer is that in an enlightened effort to preserve the liberties of men, upon the one hand, and to prevent invasion of their liberties, upon the other, it has been found that a line of demarcation must be drawn, which affords a practical balance and satisfactory test of liability. Mr. Bishop, by his "Diagram of Crime," has made plain the fact that there are many wrongs against the public that are not indictable, because too small for the law to notice: 1 Bishop's Criminal Law, sec. 600. The same is true of private wrongs. Hence, that which would be slanderous per se if said in the presence of a third person is not actionable if addressed to the object of the remark in private. The law does not discriminate between persons

who are sensitive and those who are not, and the brutality of the remark makes no difference. Yet the alleged "right to privacy" is invaded.

The wisdom of the law has been vindicated by experience. This "law of privacy" seems to have obtained a foothold at one time in the history of our jurisprudence—not by that name, it is true, but in effect. It is evidenced by the old maxim, "The greater the truth, the greater the libel," and the result has been the emphatic expression of public disapproval, by the emancipation of the press, and the establishment of freedom of speech, and the abolition in most of our states of the maxim quoted, by constitutional provisions; the limitation upon the exercise of these rights being the law of slander and libel, whereby the publication of an untruth that can be presumed, or shown to the satisfaction, not of the plaintiff, but of others (i. e., an impartial jury), to be injurious, not alone to the feelings, but to the reputation, is actionable. Should it be thought that it is a hard rule that is applied in this case, it is only necessary to call attention to the fact that a ready remedy is to be found in legislation. We are not satisfied, however, that the rule is a hard one, and think that the consensus of opinion must be that the complainant contends for a much harder one. The law does not remedy ³⁸⁴ all evils; it cannot, in the nature of things; and deliberation may well be used in considering the propriety of an innovation such as this case suggests.

We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that it is one of the ills that, under the law, cannot be redressed.

The decree of the learned circuit judge is affirmed.

The other justices concurred.

PRIVACY.—A PERSON'S RIGHT of privacy dies with him, and any rights which survive pertain to the living only: *Schuyler v. Curtis*, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22.

INJUNCTION.—THE EXHIBITION OF A STATUE of a deceased woman chosen as a representative of a class of woman philanthropists will not be enjoined: *Schuyler v. Curtis*, 147 N. Y. 434, 49 Am. St. Rep. 671, 42 N. E. 22.

PISKOROWSKI v. DETROIT, GRAND HAVEN, AND MILWAUKEE RAILWAY COMPANY.

[121 Mich. 498, 80 N. W. 241.]

RAILROADS—INJURY TO DEAF PERSON—NEGLIGENCE.—If a deaf person walking beside a railroad track in a place of safety abruptly turns at a crossing where a flagman is stationed, and attempts to cross the track, when he is struck and injured by an approaching hand-car, the crew of which have shouted repeated warnings to him, but without attempting to stop the car, he is not entitled to recover, as, being in a place of safety up to the moment of the accident, negligence cannot be imputed either to the car crew or to the flagman in not knowing of plaintiff's deafness and in assuming that he heard and would heed the warnings shouted to him.

W. E. Fenwick and A. B. Hall, for the appellant.

L. C. Stanley, W. E. Meddaugh, and Geer & Williams, for the appellee.

498 MONTGOMERY, J. On the fifteenth day of September, 1897, **499** between 5:30 and 6 o'clock in the afternoon, the plaintiff, a laboring man, about forty-two years of age, and quite deaf, was returning from his work to his home. At Superior street, in the city of Detroit, the plaintiff turned upon the track of the defendant company, upon which he intended to walk to Alexandrine avenue, one block south, where he had a message to deliver to a man who lived close to the track. Between Alexandrine avenue and Superior street there are three tracks—two main tracks and a sidetrack. The plaintiff knew that trains going north ran on the easterly main track, and trains going south ran on the westerly main track. As he was going south, he therefore walked on the easterly track, so that, in case he was in danger of being struck by a train, he could see it approaching. He walked along the ties a few inches from the west rail of the easterly main track. When the plaintiff turned upon the track of the defendant company, he looked in both directions, and saw nothing approaching, but he did not turn again until he came to Alexandrine avenue. When about thirty steps from Alexandrine avenue, plaintiff looked around for a watchman, and saw none; but, when he reached the sidewalk, he saw the flagman in the door of the flaghouse, cleaning lamps. Plaintiff had previous knowledge that a flagman was stationed at this crossing. He turned abruptly on the sidewalk across the easterly main track, along the ties of which he

had been walking. As he stepped across the rail he was struck by a hand-car of defendant company coming from behind, and severely injured, his leg being crushed and rendered useless. The hand-car was propelled by four men, with a foreman in charge of a hand-brake. When the plaintiff was about ten feet from the Alexandrine avenue crossing, and the hand-car was about thirty feet in the rear of plaintiff, the men on the hand-car shouted to him a warning, which he did not hear, and to which he paid no attention. When between twelve and fifteen feet away from the plaintiff they again shouted, and plaintiff again failed to pay any attention, and the men on the hand-car made no effort to slow up. ⁵⁰⁰ The men on the hand-car shouted a third time just before they struck the plaintiff. The testimony of one of the men, still in the employ of defendant company, was that the car was going very slow, and could be stopped within a few feet. When the plaintiff was struck he was upon the sidewalk of Alexandrine avenue, and had turned upon the sidewalk to cross the track. After plaintiff had submitted his case, upon motion of defendant's attorney the learned trial judge directed a verdict for the defendant, to which ruling of the court the plaintiff assigns error.

Two grounds of recovery are urged in this court: 1. That defendant's employes were guilty of gross and wanton negligence in running down the plaintiff, such as to excuse contributory negligence on the part of the plaintiff if the jury should find such negligence; and 2. That the flagman was guilty of negligence in failing to warn plaintiff of the approaching hand-car, and that the plaintiff, having the right to rely upon the flagman to give him warning, was not guilty of negligence in failing to look before stepping in front of the hand-car.

1. The evidence shows that the plaintiff, while pursuing his course near the track, was eight to ten inches from the rail, and there is no testimony that the hand-car had any overhang. It is asserted by defendant's counsel that, as a matter of fact, there was none, and it is not claimed by plaintiff's counsel that there was. He was then in a place of safety, if he pursued the course he was in when discovered by defendant's servants. We think negligence cannot be imputed to defendant's servants in not knowing of plaintiff's deafness, and in not assuming that he would ignore the warning given him. In this respect the case is quite similar to *Bouwmeester v. Grand Rapids etc. R. R. Co.*, 67 Mich. 90, 34 N. W. 414. See, also, *Fritz v. Detroit etc. Ry. Co.*, 105 Mich. 54, 62 N. W. 1007.

2. Was it the duty of the flagman to give warning? It seems to us that this question is governed by the same considerations which rule the former. Assuming that the flagman saw the approaching hand-car, and that he saw plaintiff approaching along the track, and that he heard ⁵⁰¹ the outcry, he would be justified in drawing the same inference that the men aboard the hand-car evidently did, viz., that the plaintiff knew of the approach of the hand-car, and therefore needed no further warning. This clearly distinguishes this case from *Richmond v. Chicago etc. Ry. Co.*, 87 Mich. 374, 49 N. W. 621, in which case the necessity of a warning to deceased was apparent to the flagman, and the flagman neglected the duty of giving notice of an approaching train. In that case it was his duty to know that plaintiff's intestate was in a position to require warning. In this case, had he known all the facts, he would not be required to assume that plaintiff would ignore the warning already given, or that he would change his course so as to come in contact with the car.

Judgment affirmed.

The other justices concurred.

RAILROADS—DEAF MAN ON TRACK.—It is negligence on the part of a deaf man to use a railway track as a highway and fail to exercise his sense of sight to detect the approach of a train, and the railroad company, if exercising due diligence, is not liable for an injury to him: *Schexnaydre v. Texas etc. Ry. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321, 14 South. 513. See, too, *Phillips v. Detroit etc. Ry. Co.*, 111 Mich. 274, 66 Am. St. Rep. 392, 69 N. W. 496.

MICHIGAN TELEPHONE COMPANY v. ST. JOSEPH.

[121 Mich. 502, 80 N. W. 383.]

MUNICIPAL CORPORATIONS—USE OF STREETS—POWER OF COURT.—A court cannot prescribe reasonable rules and regulations for the use of the streets of a city, but it may require the city authorities to adopt such regulations, and may then pass upon their validity.

MUNICIPAL CORPORATIONS—TRANSFER OF FRANCHISE.—A franchise granted by a city to a telephone company, to maintain its lines in the streets of such city, may be transferred and sold to another corporation without the consent of the municipality, under a statute expressly authorizing corporations to alienate their property.

MUNICIPAL CORPORATIONS — FRANCHISE — POWER TO DESTROY.—Acceptance of privileges granted by the laws of a state to a telephone company and a franchise granting permission to use its streets duly given by a city, followed by the expenditure of money by the corporation in valuable improvements, constitutes a contract which cannot be impaired or destroyed, unless under power reserved in the grant itself, or conferred by the state constitution.

Bill by the Michigan Telephone Company against the city of St. Joseph to restrain interference with complainant's poles and wires. It appears that on "April 4, 1881, the Telephone and Telegraph Construction Company, a corporation engaged in the telephone business in the state of Michigan, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate such a system in said village. Permission was duly granted, and that company proceeded at large expense to erect poles and stretch wires within the lines of the streets and alleys of said village until June 5, 1891, when said village became incorporated as a city. Complainant duly acquired by purchase all the property, rights, and privileges of said construction company. It has since continued to do business in said city. August 3, 1897, complainant erected in a good and workmanlike manner, and in accordance with the terms of the statute, certain poles in said city, for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service. August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them, and adopted a resolution providing that, if complainant thereafter should place any telephone poles in any streets or alleys of the city without first having obtained permission, said commissioner should forthwith remove them. The commissioner did remove the poles and wires so erected. After this action was taken, complainant, on August 10th and 16th, presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused to grant permission, and permitted a rival company, known as the Twin City Telephone Company, engaged in the same business, to set up poles and string its wires in the streets and alleys of the city. Complainant was willing and anxious to conform to all reasonable and valid regulations with reference to the placing of its poles and the stringing of its wires, and so stated in said petitions. The erection of these poles and wires is essential

to enable the complainant to do business and meet the requirements of its subscribers, and there is ample space on the streets and no public necessity justifies the refusal. September 21, 1898, the court made an order holding that the common council had the right to provide reasonable rules and regulations by which the complainant should be governed in the extension of its lines; that the council had no authority to arbitrarily prohibit complainant from erecting poles and wires upon the streets and alleys; that the reasonableness of such rules and regulations was subject to review by the court; that unless such council should within thirty days pass and enact rules and regulations by which complainant was to be governed in the extension of its lines, the writ of injunction should issue prohibiting the defendant from interfering with the complainant in erecting its poles and placing its wires. The order further required that before extending its lines, complainant should present to the court a statement of the manner in which it proposed to proceed with such extension, and prohibited complainant from proceeding except under such reasonable rules and regulations as the court should deem necessary for the public safety and convenience. On November 11th following, a formal decree was entered substantially the same as the order above recited. From this decree both parties appeal. Complainant attacks only so much of the decree as provides that the court should establish the reasonable rules and regulations. The defendant attacks the decree in its entirety."

Wells, Angell, Boynton & McMillan and N. A. Hamilton, for the appellant.

J. O'Hara, L. C. Fyfe, and O'Hara & O'Hara, for the appellee.

506 GRANT, C. J. 1. It is conceded by the learned counsel for both parties that that part of the decree by which the court assumed the right to establish reasonable rules and regulations is void. This is a legislative or administrative function, and not a judicial one. The court has power to put the proper authorities in the defendant city in motion to adopt reasonable rules and regulations, and to pass upon the validity of such action when taken. This is the extent of its authority: *Houseman v. Kent* Circuit Judge, 58 Mich. 364, 25 N. W. 369; *Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603. Other courts recognize the same rule: *Reagan v. Farmers' etc. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047; *Appeal of Norwalk St. Ry. Co.*, 69 Conn. 576,

37 Atl. 1080, 38 Atl. 708; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171.

2. It is urged that the permission granted to the Telephone and Telegraph Construction Company was personal to that company, and could not be alienated without the consent of the city. That company was organized under a general law of the state, and derived its powers and obligations from that law. The only power which a city ⁵⁰⁷ could have exercised over it was that of regulation. This is also true of the complainant. The transfer was made August 31, 1895, was recognized as valid by the city, and has been acted upon by both the city and the complainant since that time, the latter having expended large sums of money upon its business and improvements. Whether the city is now in position to question the validity of this transfer is at least debatable, but, as it is not argued by counsel, we refrain from discussing it. Counsel for the defendant cite, in support of their contention, 25 American and English Encyclopedia of Law, 751, where it is stated: "The grant of a franchise public in nature, like that of a telegraph company, is personal to the grantee, and cannot be alienated except by consent of the granting power. Therefore a telegraph company has no power, in the absence of special authority, to alienate the privileges granted to it by the federal or state government, and an agreement to transfer such privileges is *ultra vires* and void."

The compiler cites, to sustain the text, *United States v. Western Union Tel. Co.*, 50 Fed. 28, and *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 581, 3 Fed. 721. The general power of alienation was not discussed in the former case, nor was it raised. The conclusion reached was based upon the language of the act of Congress authorizing the construction of the original Union Pacific Railroad. The company sought to transfer its telegraph line, and to avoid its duty to maintain it. It was noted as a significant fact that the words "railroad and telegraph" were used in connection thirty-eight times in the act. The railroad company was not seeking to transfer all its property, rights, and privileges to a successor who would be obligated to perform all the duties imposed by the act of Congress, but was seeking to carve up its franchise, and transfer a part of it to another corporation. The duty of the railroad company to maintain a telegraph was held to be personal. The same principle was approved in *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 581, 3 Fed. 721.

508 We are also cited to *Croswell on Electricity*, section 158, which reads as follows: "A grant to a telephone, telegraph, electric light, or railway company of the power to use the streets, highways, and post-roads for the stringing of its wires and the setting of its poles contains so much of an element of personal obligation that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject." The same authorities are there cited to sustain the proposition as are cited in the encyclopedia, and, in addition, *Atlantic etc. Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 541, 1 Fed. 745. That case involved the same act as the others.

The last clause of the above section reads: "If the grant is in terms to X., his successors and assigns, or similar language, it is assignable," and cites *Atkinson v. Asheville etc. Ry. Co.*, 113 N. C. 581, 18 S. E. 254; *Toledo etc. Ry. Co. v. Toledo etc. Ry. Co.*, 6 Ohio C. C. 362; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Newman v. Avondale*, 31 Week. Law Bull. 123. In *Atkinson v. Asheville etc. Ry. Co.*, 113 N. C. 581, 18 S. E. 254, the question is not raised or discussed. The case was disposed of upon a demurrer to the bill of complaint, which set up that complainant had obtained a license from the city to build a street railway; that he had assigned it in escrow to one M., who, in breach of the trust reposed in him, assigned it to the defendant corporation. The right of sale and transfer of all the property of the corporation is not alluded to in the decision. In the Ohio case the contest was between two street railways, the question being as to the right of one company to use the tracks of the other. I do not find that the power to sell and transfer is even referred to in the case. In the California case the question is neither raised nor discussed. The sale there made was opposed upon other grounds. The case of *Newman v. Avondale*, 31 Week. Law Bull. 123, I have been unable to find.

If defendant's contention be true, a mortgage of the **509** property and franchise of these corporations would be void. The mortgage and bonds would be valueless unless there was a right to foreclose, sell, and convey to another party a valid title to the property. In *Detroit v. Mutual Gas-Light Co.*, 43 Mich. 594, 5 N. W. 1039, the grant was to the corporation, or rather to the incorporators or their assigns, who were to organize a corporation. The ordinance was silent upon the right of alienation, yet the sale of its entire property was held valid. It is immaterial that the construction company was not organized

under the same act as was the complainant. It was organized under another act, empowering such companies to carry on the like business; and one of its objects declared in its articles of association was the purpose of erecting and operating telegraph lines, etc., in the cities and towns of the state. The public was not concerned in the transfer to another corporation. It suffered no injury. The assignee was subject to the same control and obligated to the same duties as was its assignor. Justice Christiancy, in *Joy v. Jackson etc. Plank-Road Co.*, 11 Mich. 165, asserted the right of corporations to dispose of their property by absolute sale or mortgage in payment of their debts, unless such right is limited by some express provision or just implication of a statute, or by the general policy of the state, to be deduced from its legislation. In this opinion Chief Justice Martin concurred. The other justices held the mortgage in that case valid under the statute, but reserved their opinions as to the general power of such corporations to mortgage.

But whatever may be the common-law rule, the statute puts the question at rest, and expressly authorizes corporations to alienate their property: 3 Howell's Stats., sec. 4904e. The sale, therefore, to the complainant, was valid.

3. When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair ⁵¹⁰ or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys, and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for the erection and maintenance of poles and wires for telegraph and telephone companies. Here their power in the matter ceases: *Detroit v. Mutual Gas-Light Co.*, 43 Mich. 594, 5 N. W. 1039; *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749; *Saginaw v. Swift Electric Light Co.*, 113 Mich. 660, 72 N. W. 6; *Baltimore Trust etc. Co. v. Mayor etc.*, 64 Fed. 159; *New Orleans v. Great Southern Teleph. etc. Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 South. 533; *Quincy v. Bull*, 106 Ill. 337; *Hudson Tel. Co. v. Mayor etc.*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639, 28 Pac. 676.

Since the argument, counsel for defendant have called our attention to the recent case of *Richmond v. Southern Bell Teleph. etc. Co.*, 174 U. S. 761, 19 Sup. Ct. Rep. 778. The company in that case was acting under a law of Congress, and claimed the right under the act of Congress to use the streets without interference by the city authorities. The circuit court of appeals held that the rights and privileges granted by the act of Congress were subject to the lawful exercise of the police power belonging to the state or its municipalities. This holding was affirmed by the supreme court. That case is no authority for the action of the common council in the case before us. The city of Richmond had, through its common council, adopted an ordinance prescribing the terms under which the telephone company might use its streets. The reasonableness of that ordinance was not questioned.

The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petitions it ⁵¹¹ presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city, by its act of incorporation, obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both, under the police power inherent in municipalities, possessed the right of reasonable regulation. The city succeeded to the rights of the village of St. Joseph, and was in fact the same body politic: *Grand Rapids v. Grand Rapids Hydraulic Co.*, 66 Mich. 606, 33 N. W. 749.

In reason and authority, it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to establish reasonable rules and regulations for the erection of poles and the stretching of wires. The decree in this respect is affirmed. Decree will be entered in this court in accordance with this opinion, and the defendant given thirty days after service upon its mayor of a certified copy of the decree to adopt rules and regulations in accordance therewith. Complainant will recover the costs of both courts.

The other justices concurred.

FRANCHISE.—A TRANSFER of a corporate franchise cannot be made without the authority of the sovereign grantor: See *Brunswick etc. Co. v. United Gas etc. Co.*, 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 885, and monographic note thereto.

BREWER v. CHASE.

[121 Mich. 526, 80 N. W. 575.]

LIBEL—REPETITION.—If an article is libelous per se, the author cannot protect himself by showing that he has only repeated what he has heard, but he must also show the truth of the statement.

LIBEL—REPETITION.—The rule that the whole of a libel must be justified to entitle the defendant to protection applies to repetitions of a libel heard from others, as well as to original articles.

LIBEL—INSTRUCTIONS.—If the court has properly decided that an article published is libelous per se, it is error to instruct the jury in such manner as to permit it to determine that the article is not libelous.

LIBEL—EVIDENCE.—A general inquiry regarding rumors, publications, and testimony upon other trials, and the opinions of witnesses as to the effect thereof, upon the character of the plaintiff in a suit for libel, is not admissible in evidence on the issue as to the truth of such libel.

LIBEL—PUBLICATION IN ANSWER TO—MALICE—PRIVILEGE.—A publication which is fairly an answer to a libel, published in good faith for the purpose of repelling the charge, and not with malice, is privileged, though false. The court must determine whether the occasion is one which justifies such publication, but the question of good faith is for the jury.

LIBEL—PUBLICATION IN ANSWER TO—PRIVILEGE.—A publication, made in answer to a libel, to be privileged, must be in the nature of an answer like an explanation or denial, and must have some connection with the charge sought to be repelled.

LIBEL—EVIDENCE OF PROVOCATION.—In an action for libel based upon a published reply to a libelous article previously published, the latter is admissible in evidence as showing a provocation.

LIBEL—EVIDENCE—MITIGATION OF DAMAGES.—The fact that defendant in an action for libel had heard the plaintiff charged with the offenses enumerated in the libelous article may be shown in mitigation of damages, but proof of rumors or statements of such nature heard by others than the defendant are not admissible in evidence.

B. T. O. Clark and Shields & Shields, for the appellant.

W. P. Van Winkle, L. E. Howlett, and H. C. Smith, for the appellee.

527 HOOKER, J. The plaintiff is the publisher and proprietor of a newspaper named the "Livingston Herald." His action is for libel, based upon an article published in the "Livingston Republican" at the instigation of the defendant, and over his signature. The defendant filed a plea of the general issue, accompanied by a notice that he would prove the truth of

the several charges as made. A verdict of not guilty was returned, and the plaintiff has brought error.

⁵²⁸ We think the article libelous per se, as it charges the plaintiff with having committed several crimes and disgraceful and degrading acts. While the article does not state explicitly that the plaintiff had committed these acts, it says that the author was informed that he had done so, and that witnesses had so testified, and that records showed that the plaintiff had been arrested for crime. The substance of the charge is that the acts were committed, and the author cannot shelter himself by showing that he only said what he had heard. The authorities are harmonious that such statements are merely repetitions of the charge, and none the less so because the statement was that another had made such charge. In *Newell on Slander and Libel*, 350, it is said that: "Every repetition of a slander originated by a third person is a willful publication of it, rendering the person so repeating it liable to an action. 'Tale-bearers are as bad as tale-makers.' And it is no defense that the speaker did not originate the scandal, but heard it from another, even though it was a current rumor, and he in good faith believed it to be true. Nor is it any defense that the speaker at the time named the person from whom he heard the scandal. A man cannot say, 'There is a story in circulation that A poisoned his wife,' or 'B picked C's pocket in the omnibus,' or that 'D has committed adultery,' and relate the story, and, when called upon to answer, say: 'There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it'; and for two very plain reasons: 1. The repetition of the story must, in the nature of things, give it currency; and 2. The repetition without the expression of disbelief will confirm it. The danger—an obvious one—is that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequence of a repetition."

In a Massachusetts case (*Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345) cited by *Newell*, the trial court instructed the jury that: "If the defendant merely said that there was a story in circulation of the kind set forth in the writ, and did not say so with any purpose or design to extend its circulation, ⁵²⁹ or in any degree to cause the person whom she addressed to believe or suspect the charge which the story imputed to be true, or to add to it any sanction or authority of her own, or to give to it any further circulation or credit, and it was true that such a story was in circulation, it would not be actionable to say so."

The appellate court reversed the judgment, saying: "The story uttered or repeated by the defendant contains a charge against the plaintiff of a nature to destroy her reputation. . . . It is no answer in any forum to say that she only repeated the story as she heard it. If the story was false and slanderous, she must repeat it at her peril. There is safety in no other rule."

In *McPherson v. Daniels*, 10 Barn. & C. 263, it was held that 'if A. said of X. that he was a thief, and C. publishes that A. said that X. was a thief, in a certain sense C. would publish the truth, but not in a sense that would constitute a defense. C.'s publication would in fact be but a repetition of A.'s words.

In *Odgers on Libel and Slander*, 173, it is said: "This rule that the whole of the libel must be justified to enable the defendant to succeed applies to all cases of reported speeches or repetitions of slander. Thus, if the libel complained of be, 'A B. said that plaintiff had been guilty of fraud,' etc., it is no avail to plead that A B did in fact make that statement on the occasion specified. Each repetition is a fresh defamation, and the defendant, by repeating A B's words, has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be in answer to the action must not merely allege that A B did in fact say so, but must go on to aver, with all necessary particularity, that every word which A B is reported to have said is true in substance and in fact. In short, a previous publication by another of the same defamatory words is no justification for their repetition."

We cannot say that the evidence did not warrant this verdict, because we have not all of the testimony before us. An examination of the charge leads us to believe that the jury may have based the verdict on a belief of ⁵³⁰ the literal truth of the language used in the article sued upon as a full justification. The charge consisted mainly of requests. The following request of the defendant was given: "I charge you the plaintiff cannot recover if you are satisfied that the defendant has fairly established the truth of the publication sued upon substantially as the publication is set forth in the plaintiff's declaration; that is, as I understand it, the reputation of the alleged libelous article as shown by the paper published."

By this the jury might well conclude that it was unnecessary for the defendant to show that the plaintiff had been guilty of the acts charged, and that it was sufficient to find that he had

been accused of them. This would not be proof of the substance of the charge, and would not constitute a justification.

Again, one of the plaintiff's requests was to the effect that the article was libelous per se. The court properly gave this. But this was followed by a series of requests, covering nearly every charge contained in the article, of which the following is a sample: "In considering this article, you should consider the whole together, and if, from all the statements in this article, you do not believe that an ordinary person reading the same would fairly understand that defendant intended to charge that plaintiff had been guilty of burglary, then the plaintiff cannot recover for this charge."

Thus, after telling the jury that the article was libelous per se, the court allowed them to find that it was not libelous. As we have said, we consider the article libelous per se, and it follows that the jury should not have been permitted to say that it was not. The questions to be submitted to them were: 1. The truth or falsity of the statements; 2. The question of damages.

The record is a long one, and many questions are raised. In view of a possible retrial of the case, we should, perhaps, refer to some of them. The plaintiff called one Barnes, by whom he proved that the defendant caused the publication ⁵³¹ of the article in the newspaper of the witness. He also gave some testimony regarding the circulation of his paper. His entire direct testimony appears upon a single page of the record. Upon cross-examination, the defense proved the previous publication of a series of articles in plaintiff's paper, and the opinion of the witness that they led to the publication sued upon, and introduced the articles in evidence. The witness was then permitted to testify at length as to current reports regarding the plaintiff in relation to the charges contained in the article sued upon, viz., that the plaintiff had been arrested for burglary at the expense of the taxpayers, and that he had heard a witness testify in justice's court that plaintiff had committed a forgery, and that he embezzled property, and about the arrest of the plaintiff for trouble with a woman. In short, he was allowed to testify to all sorts of rumors, and to follow it up by stating that, in his opinion, the trial for assault and battery "showed plaintiff up pretty dark." He was also allowed to state that these various reports were published from time to time in his paper, and circulated, and the papers were introduced in evidence. We think it much more orderly for a special defense, like that

of truth in an action for libel, to be made by the defense after the plaintiff's case is closed. But, whether it may be gone into on cross-examination or not, it was not competent to enter upon a general inquiry regarding rumors and publications and testimony upon other trials, and the opinion of the witness as to the effect upon plaintiff's character. Again, if the defendant desired to show that he published an article upon information and an honest belief of truth, the natural course would be to show in an orderly way his information, and his reliance upon it, and the rectitude of his intentions, rather than to enter upon a general investigation of plaintiff's history, and the opinion of members of the public regarding it: *Wolff v. Smith*, 113 Mich. 360, 70 N. W. 1010.

The claim is made that the publication was privileged. The libel complained of charged defendant with corruption ⁵³² in office. To repel that statement, the defendant undertook to show that the plaintiff was an impostor, and really had no interest in the public welfare, by showing his past acts and history, asserting that the only thing of which he could boast was that he had always escaped the vigilance of the law. Proceeding, he said: 1. That the records showed that, many years before, plaintiff had been arrested for burglary, and put the people to much expense; 2. That he was subsequently charged and arrested for burglary from a dwelling; 3. That he had been informed that plaintiff had been arrested for forgery of a note; that he settled (he proved another) the note, and saved himself from state prison; 4. That he sold sewing-machines, and embezzled the property received in payment; 5. That defendant heard a woman swear on the stand that he had insulted a woman; 6. That while defendant was sheriff, the plaintiff sought to have him arrest a woman for disturbing the peace, but upon investigation he (the defendant) became satisfied that he sought to intimidate the woman to avoid his own arrest; that he was subsequently arrested for assault and battery for committing an assault upon her, and the case disclosed an appalling history of the plaintiff; 7. That his neighbors state that, attracted by the shrieks of his wife, they found him threatening personal violence to her with a hoe; 8. That on another occasion he tore the clothes from her because they were not pleasing to his taste; 9. That afterward he caused her to be sent to the insane asylum at the public expense; that some persons thought he ought to be made to pay the expense, as they stated that they believed him to be to blame for her condition; 10. That soon

afterward he testified in court that he was worth five hundred dollars above debts and liabilities from execution, in direct contradiction to his former affidavit.

It is contended that these statements were privileged, because made in self-defense, upon the theory that they discredit the plaintiff, and show him unworthy of belief. The law justifies a man in repelling a libelous charge by a ⁵³³ denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false. The court will determine whether the occasion is one which justifies such publication, but the question of good faith—i. e., malice—is for the jury. It must not be supposed that, when a libelous article is published, the person libeled is at once authorized to publish any and all kinds of charges against the offender, upon the theory that they tend to degrade him, and thereby discredit his libelous statements. If this were so, every libel might be answered in this way, and the most disgraceful charges made, the person making them being able to shelter himself behind his belief in their truth. The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection with the charge that is sought to be repelled. The claim is made that anything which tends to induce a disbelief of the charge is privileged. In support of this proposition, defendant's brief quotes the following:

"In some cases, so we have seen, the plaintiff's conduct toward the defendant may be a bar to the action. If the plaintiff has attacked the defendant in the newspaper, and the defendant replies without undue personality, and without wandering into extraneous matters, then such reply, if made honestly in self-defense, is privileged": Odgers on Libel and Slander, 306.

"Every man has a right to defend his character against false aspersion. It may be said that this is one of the duties which he owes to himself and to his family. Therefore communications made in fair self-defense are privileged. If I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, where such retort is a necessary part of my defense or fairly arises out of the charges he has made against me": Odgers on Libel and Slander, 228.

In this it is observable that the rule limits the privilege to retorts which are "necessary to the defense, or fairly ⁵³⁴ arise out of the charges made." But the language should be viewed in the light of the cases upon which it rests. The first authority given by the author is *Senior v. Medland*, 4 Jur., N. S., 1039. At an election of vestrymen, the plaintiff accused the defendant of neglecting his official duties, who retorted that the plaintiff had been bribed by a railway company. The court held that it was not privileged for it was not made in self-defense, yet, if true, it would tend to discredit him. In *Huntley v. Ward*, 6 Com. B., N. S., 514, the plaintiff caused his attorney to write to the defendant a letter demanding payment of an alleged debt. The defendant replied by a letter containing aspersions on plaintiff's character. It was claimed to be privileged. The court held otherwise. Willes, J., said: "There are, however, certain excepted cases where a communication is privileged, though prima facie libelous. But these are cases where the matter is written in the assertion of some legal or moral duty, or in self-defense, and the thing is done honestly, and without sinister motive, and in the bona fide belief in the truth of the statement at the time of making it. In such cases, no matter how harsh, hasty, untrue, or libelous the publication would be but for the circumstances, the law declares it privileged, because the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of a private injury. Therefore, upon principles of public policy, such communications are protected. The question is whether the letter in the present case falls within that category. It appears to me that the principle does not apply. There was no legal or moral duty to be discharged by writing a letter to the plaintiff's attorney heaping abuse upon his client. It was not written either in assertion of or defense against any claim, and therefore does not fall either within the principle or within any of the decided cases. As to the authorities which have been cited, one, of course, at once assents to the doctrine that, if the communication would be privileged provided the statement were made honestly and bona fide, there must be some evidence of sinister motive or untruth to turn the scale, and to take the case out of the privileged class. If that were not so, ⁵³⁵ the privilege would be all but useless. But, to entitle him to the benefit of the rule, it is necessary that the defendant should make out that the circumstances of the publication were such as to bring the case within it. I think in this case the defendant

has failed to do that, and therefore there is no ground for disturbing the verdict."

In *Dwyer v. Esmonde*, L. R. 2 Ir. 243, it was held that a publication was privileged when it was an answer to charges, and necessarily libeled the plaintiff.

In *Newell on Slander and Libel*, section 120, page 519, the author says: "Every man has a right to defend his character against false aspersion. It is one of the duties which he owes to himself and to his family. Therefore, communications made in fair self-defense are privileged. If a person is attacked in a newspaper, he may write to the paper to rebut the charges, and may at the same time retort upon his assailant, where such retort is a necessary part of his defense, or fairly arises out of the charges he has made. A man who commences a newspaper war cannot subsequently come to the court as plaintiff to complain that he has had the worst of the fray. But, in rebutting an accusation, the party should not state what he knows at the time to be untrue or intrude unnecessarily into the private life or character of his assailant. The privilege extends only to such retorts as are fairly an answer to the attacks."

In *Chaffin v. Lynch*, 83 Va. 117, 1 S. E. 803, the court said: "Therefore, if a communication goes beyond the occasion, and language is used which unnecessarily defames the plaintiff, such language is not considered as having been used in the due performance of a duty, or in the protection of the defendant's interest, and is not privileged. And the same rule applies where the publication is more extensive than the circumstances of the case reasonably require."

In *O'Donoghue v. Hussey*, 5 I. R. C. L. 124, it was held that it was a reasonable mode of defense for a person whose character and conduct had been assailed in a public newspaper to state publicly that his assailant was known to be a person in the habit of making misstatements. But ⁵³⁶ in the case of *King v. Staples*, And. 228, one Thomson had said that Staples had asked his (Thomson's) pardon for saying that he (Thomson) was married to one Mrs. W. Staples retorted that Thomson was "scandalously guilty of telling a lye in divers companies." The court held that, while a denial would have been privileged, the words used were not, saying that "nothing tends more to breach of the peace and to bloodshed than the word 'lye,' as nothing else can be answered to it," and the defendant was held criminally liable. But the case of *O'Donoghue v. Hussey*, 5 I. R. C. L. 124, is noticeable for another reason, as it may be inferable

from it that any retort is necessarily privileged, and must go to the jury upon the question of malice. The language used is as follows: "It occurs to us that these cases establish this proposition: That if a party choose to have recourse to a public newspaper, and publish statements reflecting on the conduct or character of another, the aggrieved party may have recourse to the public press for his defense and vindication; and in so doing, if he reflects on the conduct or character of his assailant, it will be for the jury to say whether he did so honestly in self-defense, or was actuated by malice toward the party who originally assailed him."

It is at least doubtful if such an implication was intended, but, if that should be admitted, the case would stand alone. That case was reviewed in the case of *Murphy v. Halpin* (1874), 8 L. R. C. L. 132, by Fitzgerald, B., who participated in the former case, from which it appears that his understanding was that the court did determine the relevancy and connection of the alleged libels. In the *Murphy* case the court passed on that question, and decided that the retort was not privileged.

The overwhelming weight of authority supports the doctrine that the court decides whether the writing is one within a qualified privilege: See *Brown v. Croome*, 2 Stark. 297; *Gassett v. Gilbert*, 6 Gray, 97, 99; *Chaffin v. Lynch*, 84 Va. 884, 6 S. E. 474; *Easley v. Moss*, 9 Ala. 266; *Smith v. Smith*, 73 Mich. 445, 16 Am. ⁵³⁷ St. Rep. 594, 41 N. W. 499; 13 Am. & Eng. Ency. of Law, 422. Our own case of *Myers v. Kaichen*, 75 Mich. 272, 42 N. W. 820, impliedly recognizes the doctrine. In *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 175, 33 N. W. 181, this subject is discussed, and the language of Baron Parke in *Toogood v. Spyring*, 1 Crompton, M. & R. 193, approved, i. e.: "That if such communications are fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits": See, also, *Pollasky v. Minchener*, 81 Mich. 283, 21 Am. St. Rep. 516, 46 N. W. 5; *Garn v. Lockard*, 108 Mich. 198, 65 N. W. 764; *Harrison v. Howe*, 109 Mich. 480, 67 N. W. 527.

In the case of *Smith v. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. 499, the occasion was, in a sense, one where the defendant was privileged to publish his wife, and the publication was relevant to the subject, though excessive; and it was held not error against the defendant to submit the question to the jury.

It does not follow that an irrelevant charge must be submitted to a jury to determine whether it is excessive, for such cannot be privileged under any circumstances.

In *Smith v. Youmans*, 3 Hill (S. C.), 85, the court said: "In general, however, where it appears on the plaintiff's showing, or on evidence produced by the defendant, that the publication was made on such an occasion or under such circumstances as have been specified, and that the words were spoken bona fide in the discharge of some legal or moral duty, rendered necessary by the exigencies of society, the occasion affords a prima facie presumption to rebut the inference of malice, and the plaintiff would fail without further proof: See 4 Starkie on Evidence, 863, and the cases there cited." See *Hart v. Reed*, 1 B. Mon. 166, 35 Am. Dec. 179; *Gray v. Pentland*, 4 Serg. & R. 424; *Flitcraft v. Jenks*, 3 Whart. 161.

In *Dwyer v. Esmonde*, 11 I. R. C. L. 542, it was said: 538 "Yet affirmative allegations of misconduct of the party who has libeled another, made in reply, if unconnected with the conduct charged in the first publication, and not mere matter of excess, are not privileged."

A unique case upon this subject is *Pasquin's Case*, unreported, except as referred to in *Tabart v. Tipper*, 1 Camp. 351. In that case it is said that, when it appeared that the plaintiff's own publications were libelous and scandalous, Lord Kenyon threw his manuscript at the plaintiff's head, and dismissed him from the court with infamy.

The case that goes the furthest toward supporting the defendant's claim is *Goldberg v. Dobberton*, 46 La. Ann. 1303, 16 South. 192. In the syllabus it is said: "The interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved; and a verdict rendered in such a case will not be disturbed by the supreme court."

Copious notes upon this subject will be found in 28 L. R. Ann. 721, from which it will be seen that the Louisiana case is exceptional. Numerous authorities are cited which are not repeated here.

The charges to which we have called attention have no connection with the charge of corruption in office, previously made by the plaintiff. The only claim made for these is that they discredit him. We have called attention to one case where it was held that a retort that the libelant was known to be in the habit of making misstatements was privileged, but that is a dif-

ferent matter from asking the public to infer that the charge contained in the libel was untrue because some one had accused the libellant of some misconduct which had no connection with the alleged libel; as that he had cheated someone in a horse trade, or had committed assault and battery upon one, or had been accused of some criminal act, or was a man of low character and bad habits. It seems to us manifest that very little, if any, of this alleged libel, was relevant ⁵³⁹ to the charge which called it forth, and therefore that it was not, as a whole, privileged. It does not follow that the previous articles published by the plaintiff were not admissible in mitigation as showing provocation.

Another subject should be referred to in this connection. Much testimony was admitted tending to show that the plaintiff had been charged with the offenses described in the alleged libel. It was competent to show in mitigation of damages that the defendant had heard that such charges had been made, but it was unimportant whether other persons had heard them or not. The case of *Wolff v. Smith*, 112 Mich. 360, 70 N. W. 1010, is in point. It was insisted that it was competent to show that the statements contained in the libel were literally true, whether the charges which they reflected were true or not. We have already shown that it was necessary to prove the truth of the latter to make out a justification. Nothing less would do. It was incompetent to prove the former, because, not being privileged, they could not amount to a defense, and, had they been privileged they would have amounted to a defense, though false, unless stated maliciously. Whether stated maliciously or not would not depend upon the truth of the charges of arrest, etc., but upon defendant's information and belief upon such subjects. Proof that the gist of the charges was true would tend to show belief as well as justification. Proof that others had heard rumors or statements tended to prove neither that the defendant had heard them nor that he believed them.

The judgment is reversed and a new trial ordered.

The other justices concurred.

LIBEL—REPETITION.—The fact that a libel is but a repetition of one previously existing does not justify it, and will not be received in evidence as a complete defense: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 342; *World Pub. Co. v. Mullen*, 43 Neb. 126, 47 Am. St. Rep. 737, 61 N. W. 108; *Upton v. Hume*, 24 Or. 420, 41 Am. St. Rep. 863, 33 Pac. 810. Whether in actions for libel or slander the defendant may prove in mitigation of damages that he did not originate the de-

damatory charge, is considered in *Hoboken Printing etc. Co. v. Kahn*, 58 N. J. L. 359, 55 Am. St. Rep. 609, and note thereto, 33 Atl. 382, 1060.

LIBEL—OPINION EVIDENCE.—In an action for libel it is not competent for a witness to give his opinion as to the purpose of the defendant in making the alleged libelous publication: *Soloman v. American Mercantile Exchange*, 93 Me. 436, 74 Am. St. Rep. 366, 45 Atl. 510; or as to the meaning of such publication: See the monographic note to *Dickson v. State*, 53 Am. St. Rep. 700.

LIBEL—EVIDENCE OF PROVOCATION.—In a criminal prosecution for libel the defendant may show in mitigation that the libel was provoked by a libel upon him by the prosecuting witness: *Hartford v. State*, 96 Ind. 461, 49 Am. Rep. 185. See, too, *De Camp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692, 35 N. E. 1056.

CLAWSON v. CITIZENS' MUTUAL FIRE INSURANCE COMPANY.

[121 Mich. 591, 80 N. W. 573.]

INSURANCE—FALSE REPRESENTATIONS—WAIVER.—If a tenant by the entirety procures insurance on a building on the land, stating in his application that he holds the title by "deed," and receives a policy conditioned that it shall be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured, in fee simple, he is entitled to recover if not guilty of willful misrepresentation, on the ground that such application is sufficient to put the insurer on inquiry as to the nature of the insured title, and that by issuing the policy without inquiry the condition in the policy is waived.

INSURANCE—INSURABLE INTEREST.—An estate by entirety is an insurable interest in the whole premises.

G. S. Wilson and C. A. Blair, for the appellant.

G. C. Fox, for the appellee.

592 **HOOKE**, J. The plaintiff procured a policy of insurance from the defendant company. The application was made upon a printed blank furnished by the defendant's agent, who wrote the answers to the questions contained thereon, as given by the plaintiff. To the sixth question, "What is your title?" the plaintiff answered, and the agent wrote, "Deed." The application concluded with the following clause: "In consideration of the protection afforded by the company, it is hereby agreed on the part of the applicant that he will abide by the regulations of the company as contained in their policy, and pay his equitable proportion of the rate necessary to pay losses

and expenses, not exceeding the sum specified in this application, during the life of the policy."

The application was sent to the home office, which issued and forwarded the policy, which was the Michigan standard form. It contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; . . . or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

On February 18, 1898, the property insured, including a building, was destroyed by fire. On March 8th, proof ⁵⁹³ of loss was made on a blank furnished by an agent of the defendant, when it appeared that the plaintiff and his wife held title to the premises under a deed which made them tenants by the entirety. Thereupon the defendant refused to pay the loss, and this action was brought.

Two points are raised in the brief of the appellant: 1. That the application misrepresented the plaintiff's title; 2. That the policy is void under the provisions quoted.

The cause was tried by the court, and written findings were filed. The court found that there was neither fraudulent misrepresentation nor concealment of the plaintiff's title, and held that the provisions of the policy were waived. The defendant has appealed.

It is contended that the statement that the title was held by deed was equivalent to a representation that plaintiff held title in fee, whereas he had no inheritable title, being neither a tenant in common nor an ordinary joint tenant, as his wife had a right of survivorship of which he could not divest her, and might become sole owner in fee at his death. The conditions of the policy are valid, and there is nothing in the findings to excuse the plaintiff from not knowing that they were in the policy. It is also true that the plaintiff's title did not meet the requirements of such conditions, and that he should not have been permitted to recover, unless the conditions were waived. The policy indicates that risks upon property, the sole, absolute, and unconditional title to which is not in the insured, are not desired, and, if taken at all, will be confined to cases where it is expressly so provided. In such cases these conditions are waived, and wherever the writings which constitute the contract

show an express waiver, or facts which may be said to put the company upon inquiry in relation to the title, it is not unreasonable to say that there is such waiver. A contract of insurance is executed by the insured by payment of the premium, while it is executory by the company. If, after a fire, it turns out to be void, there is little, if any, loss to the company, for, ⁵⁰⁴ at most, it must refund the premium; but to the insured the loss is greater. Holding a policy void in a case of this kind is akin to enforcing a forfeiture, and there is no hardship in holding the company to the utmost good faith. The application asked the plaintiff to state by what title he held this property, which neither the application nor policy described as "his." His reply was, "Deed." This did not convey any information upon the question of his sole and absolute ownership in fee, for his deed might be any kind of a deed, and it might purport to convey any of the numerous estates less than a fee simple that may be conveyed by deed. It was a representation that he had a deed of the entire parcel, but the estate sought to be conveyed by the deed was not intimated. The agent knew that, and the home office knew it when the policy was issued, and we think it no injustice to hold that the company intended to insure whatever insurable interest he had in the entire premises.

We do not mean to be understood that the company was not justified in believing that his deed covered the entire premises. Had it covered but the south one-fourth, or the undivided one-fourth, or any other aliquot part, we might say that it was a misrepresentation, and that the clear implication was that the plaintiff had title by deed to the property that he was insuring, upon which the company had the right to rely. The case of *Miotke v. Milwaukee etc. Ins. Co.*, 113 Mich. 166, 71 N. W. 463, discusses a similar question, although the circumstances under which the policy was taken were different. The plaintiff had an estate well known to the law in the entire parcel. It was not an absolute estate in fee, but it might ripen into one. The character of his holding was discussed by Mr. Justice Moore in the recent case of *Dickey v. Converse*, 117 Mich. 449, 72 Am. St. Rep. 568, 76 N. W. 80. This was an insurable interest in the whole, and one which the defendant was bound to know might be conveyed by deed. We think this point covered by the case of *Miotke v. Milwaukee etc. Ins. Co.*, 113 Mich. 166, 71 N. W. 463.

The judgment is affirmed.

The other justices concurred.

INSURANCE.—A CONDITION AS TO THE OWNERSHIP of the property in a policy of insurance is to be understood, not in its technical sense, but as requiring that the insured shall be the actual and substantial owner: *Yost v. McKee*, 179 Pa. St. 381, 57 Am. St. Rep. 604, 36 Atl. 317. If an insurance company issues a policy without inquiry as to the condition of the property or state of its title, and the insured has an insurable interest, the company insures such interest, and waives the conditions of the policy as to ownership about which no statement was required or inquiry made: *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774.

REED v. REED.

[122 Mich. 77, 80 N. W. 996.]

PARTITION — COTENANTS — OUTSTANDING LIENS. — A bill for partition cannot be maintained by one cotenant against another, who has purchased and foreclosed outstanding mortgage liens on the common property, without tendering, or offering to pay, his proportion of the amount in redemption from the sale.

Bill for partition. The parties, complainants and defendants, were tenants in common of the land, which was mortgaged. The defendant Reed purchased and foreclosed the outstanding mortgage liens, and the complainants filed a bill for partition without tendering, or offering to pay, their proportions of the amount in redemption from the sale. The amount of defendant Reed's lien was fixed, and a sale of the premises ordered with a direction that the amount due Reed be first paid, and the remainder divided among the cotenants. The defendant Reed appealed.

Gray & Gray, for the appellant.

Louis E. Howlett, for the appellees.

⁷⁸ GRANT, C. J. The theory of the bill is that the foreclosure deed to defendant Reed is absolutely void, and that he could obtain no title, as against his cotenants, by purchasing and foreclosing the outstanding liens. The deed was not void, but voidable. This is conceded by counsel for Mr. Reed, and they admit that timely proceedings in redemption by the cotenants would have defeated his title. It was necessary for the protection of all that some one of the cotenants should either pay or purchase these mortgages, or, if foreclosed by the mortgagee, protect their interests upon the sale by purchase, or

redemption after sale. Mr. Reed was the owner of the undivided six-twelfths, and he chose to purchase and foreclose the liens. The law gave him the right to do this. The law also gave the right to his cotenants to share in the benefits of that sale by contribution. They did not do this, but seek to impose upon Mr. Reed all the cost and risk. If the property should not sell for sufficient at the sale upon this decree to pay the amount of indebtedness, he will be out all his expenses, and has been subjected to the costs of this suit, while his cotenants lose nothing and assume no risks. The law does not permit cotenants to thus speculate with their common property. Law and equity deal with cotenants after one of them, as ⁷⁹ he has the right to do, has purchased the outstanding liens or titles. Before cotenants can take proceedings to secure the benefit of such purchase by another cotenant, they must do equity, namely, tender or offer to contribute their proportionate shares of the amount paid in purchase of these outstanding liens: Freeman on Cotenancy, sec. 154; 11 Am. & Eng. Ency. of Law, 1083; Lee v. Fox, 6 Dana, 171; Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Flagg v. Mann, 2 Sum. 523; Fed. Cas. No. 4,847; Buchanan v. King, 22 Gratt. 419; Mandeville v. Solomon, 39 Cal. 133; Wilmot v. Lathrop, 67 Vt. 671, 32 Atl. 861; Stevens v. Reynolds, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931. Cotenants desiring to share in such purchase must move promptly; that is, within a reasonable time. The cotenants in this case have not moved at all, except upon the theory that the purchase by the cotenant was absolutely void, and that they were not subject to contribution. They have neither done nor offered to do equity.

Decree reversed and bill dismissed, with the costs of both courts.

The other justices concurred.

PARTITION BETWEEN COTENANTS—EXTINGUISHMENT OF LIENS—REIMBURSEMENT BEFORE DIVISION.—A cotenant is entitled to be reimbursed for moneys expended in extinguishing liens upon the common property: Notes to Stevens v. Reynolds, 52 Am. St. Rep. 435; Flack v. Gosnell, 35 Am. St. Rep. 419. On a partition, under the Illinois statute, a cotenant who has made improvements is entitled to have the improved part allotted to him, estimating its value as if unimproved; or, if a division cannot be had, and a sale is ordered, he is entitled to have the increase of price, occasioned by the improvements, paid to him out of the proceeds before a division: Note to Louville v. Menard, 41 Am. Dec. 166.

FERGUSON v. WILSON.

[122 Mich. 97, 80 N. W. 1006.]

APPEAL—ASSIGNMENTS OF ERROR—WAIVER OF.—An assignment of error not mentioned in the appellant's brief will be treated as waived.

MOTIONS AND ORDERS—REVIVAL OF ACTION, ORDER AS TO—NECESSITY OF COURT'S SIGNATURE—OBJECTION—VALIDITY OF.—An order that a suit be revived should be signed by the court, but if signed by the attorneys, it will be treated as if signed by the court where, upon the showing made, the court would have granted the order as of course. Hence, an objection first made upon the trial, when the plaintiff seeks to make out his case, that the testimony cannot be received, because the suit has not been revived, should be overruled, where the defendant made no objection when the new declaration was filed and pleaded only the general issue.

CHattel MORTGAGES—NOT VALID, WHEN UPON AFTER-ACQUIRED PROPERTY.—One may mortgage after-acquired property, but this rule does not apply to goods and chattels subsequently acquired, which have no connection with property actually in existence at the time of the mortgage. Hence, if a mortgage is given upon specified chattels to secure annual payments of money for a number of years, a clause therein inserted by the mortgagor that it shall also cover "all other personal property" which he "may own or acquire during said years" does not, as against bona fide purchasers or attaching creditors, create a valid lien upon property acquired subsequently, outside of the business in which he was then engaged, and having no connection therewith.

Trover by James F. Ferguson. There was a judgment for the plaintiff and the defendant brought error.

F. E. Burton and E. C. Babcock, for the appellant.

C. F. Gates and D. S. McClure, for the appellee.

⁹⁸ **LONG, J.** There are twenty assignments of error in this case. None of them are, however, mentioned in the brief of the appellant, except perhaps two. The ones not mentioned will be treated as waived, under the rule in *Black v. Dawson*, 82 Mich. 485, 46 N. W. 793. Supreme court rule No. 40 provides that the appellant, in his statement of facts, and distinct from the argument, shall state the errors upon which he relies, the questions involved, and the manner in which they are raised. This rule was adopted to save the time of the court in going through voluminous records to ascertain the questions involved and the errors relied upon, by putting this burden upon counsel for appellant. It is observed that many of the attorneys do not live up to this rule in full, as they very frequently mix

up the facts with arguments and their conclusions drawn from the facts. No attempt has been made by appellant in this case to follow this rule. While we shall examine the case and determine the questions which we think are involved, it must not be taken as a precedent for future cases.

This suit was brought in trover by the administrator of the estate of Charles Ferguson, deceased, to recover the value of certain personal property. The cause was tried by a jury, who returned a verdict in favor of plaintiff. Defendant brings error.

1. It is contended that it developed on the trial for the first time that the plaintiff was acting as administrator for Charles Ferguson. From what we gather from the record, it appears that the suit was commenced in the lifetime of Charles Ferguson; that after his death it was revived in the name of his administrator, and a new declaration filed, to which the defendant pleaded the general issue only. The record shows the proceedings from the probate court appointing the plaintiff as administrator. While the order that the suit be revived in the name of the administrator appears to have been made and signed by the attorneys in the case, and not by the court, it is not shown that any objection was taken to the form of it when the declaration was filed, but that a plea of general issue was filed. On the trial when the plaintiff sought to make his case, the objection was first made that the testimony could not be received because the suit had not been revived. This was overruled. While the order should have been signed by the court or entered in the court journal, instead of by the attorneys and entered in the book of common rules, yet there was no error in overruling the objection. It was shown by the records that Charles Ferguson had deceased, and that the plaintiff had been appointed administrator; and the order was one which the court would have granted of course upon this showing. The case will be treated as though the court had then and there granted the order.

2. Plaintiff's claim to the property in controversy arises: 1. Under a certain chattel mortgage given by one George Wiggins to Charles Ferguson, plaintiff's intestate, on November 1, 1893, and filed in the town clerk's office, November 6, 1893, the consideration mentioned being one hundred and fifty dollars, and covering one bay horse, one gray horse, one binder, one mower, five yearlings, and one calf. 2. Under a chattel mortgage given by Wiggins to Charles Ferguson, October 27, 1893, and filed in the town clerk's office, November 6, 1893,

covering all the crops and stock raised on the farm let by Ferguson to Wiggins on that day, and also all the stock, sheep, cattle, hogs, horses, tools, and machinery that might be used or kept on said farm. This chattel mortgage is contained in a lease given by Ferguson to Wiggins for the farm, and to secure the rent thereof. 3. Under a bill of sale of all the property described in the two mortgages above mentioned, given by Wiggins to Charles Ferguson, and dated November 6, 1895.

The defendant claimed under a chattel mortgage given by Wiggins to him on February 6, 1893, to secure the payment of three hundred and eighty dollars, payable fifty dollars each year for six years, and eighty dollars seven years from date, with interest at seven per cent. This mortgage covered the binder claimed by plaintiff to be covered by his mortgage and bill of sale, and certain cattle, sheep, crops on the farm, etc.; and also provided ¹⁰⁰ that it should cover "all crops, of whatsoever name or nature, to be sown, planted, and grown on said premises during the years 1893 to 1899, inclusive; also all the increase of the above-described stock, and all other personal property which I may own or acquire during said years." This mortgage was prior in time of filing to the mortgages given by Wiggins to plaintiff's intestate, and was duly recorded in the town clerk's office, and renewed from year to year.

The real controversy between the parties arises over the interpretation of the clause in defendant's mortgage, "and all other personal property which I may own or acquire during said years." It appeared that Mr. Wiggins was the owner and was in possession of the property described specifically in the mortgage given by him to the defendant. The court instructed the jury substantially that, as to the articles of property specifically mentioned in his mortgage, there could be no question as to defendant's right and title, but that defendant could not claim a lien under the general clause, "and all other personal property which I may own or acquire during said years," upon the property afterward acquired, and having no connection with the property owned by him at the time of the giving of the mortgage. It is this last part of the charge of which counsel for defendant complain, their contention being that defendant's mortgage was a lien upon all of the after-acquired property. It is conceded by counsel for plaintiff that it is settled in this state that one may mortgage after-acquired property, and the mortgage will be upheld; but it is contended that this rule does not apply to goods and chattels subsequently ac-

quired which have no connection with property actually in existence at the date of the mortgage. This was undoubtedly the view taken by the court below. The general rule in many of the states is that at common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident ¹⁰¹ of other property then in existence and belonging to him; that a mortgage on goods which the mortgagor does not own at the time of making the mortgage, though he may afterward acquire them, is void in respect to such goods, as against subsequent purchasers or attaching creditors; and the rule in Massachusetts and Missouri and some other states is that, if a mortgage be made of a stock in trade, it will not at law cover additions afterward made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold: *Barnard v. Eaton*, 2 Cush. 294; *Gregory v. Tavenner*, 38 Mo. App. 627. Cases from other states might be cited where the same rule is laid down. In this state, however, it has many times been held that a mortgage on a dealer's stock may be made to cover after-acquired goods; but it is held that they must be brought within its descriptive words, and a mortgage drawn to cover goods to be "added to" the stock, or gotten "for use" in the business, will not include goods bargained for, but never received at the place of business, or which, on being received, are devoted to some other purpose: *Curtis v. Wilcox*, 49 Mich. 425, 13 N. W. 803.

In *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734, the property in question covered by the chattel mortgage was certain horses, wagons, etc., and certain mill machinery, lumber, shingles, posts, and other materials in and about the planing-mill of the mortgagors. The mortgage contained the following clause: "And also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business."

The property was attached by a creditor, and the mortgagee brought trover. It was held that the clause in the mortgage was valid, even as against third parties: Citing *Gay v. Bidwell*, 7 Mich. 525; *People v. Bristol*, 35 Mich. 29; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52; *American Cigar Co. v. Foster*, 36 Mich. 368; *Curtis v. Wilcox*, 49 Mich. 425, 13 N. W. 803; *Leland v. Collver*, 34 Mich. 418.

¹⁰² In no case, however, has this court held that a clause in a chattel mortgage like the one in the present case, to wit, "and all other personal property which I may own or acquire during said years," creates a valid lien upon after-acquired property not connected with the business in which the mortgagor was engaged, as against subsequent good faith purchasers or attaching creditors, whatever may be the rule as between the parties themselves. The property in controversy here had no relation to that in possession of the mortgagor at the time of giving the mortgage. He did not then own the property, but afterward acquired it, outside of the business in which he was then engaged. The case is not like the case of *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734, nor like the case of *Dunn v. Michigan Club*, 115 Mich. 409, 73 N. W. 386. In the last case it appeared that the mortgage covered all the mortgagor's stock in trade, all book accounts, notes, etc., owned by him or appearing on the books of said business then being conducted by him, "and all future book accounts representing proceeds of sales of goods in mortgagor's stock, and all additions to the same." It was held that this covered all future book accounts, though not entered on the books.

The court below was not in error in the charge as given. The judgment must be affirmed.

The other justices concurred.

ASSIGNMENTS OF ERROR not made in accordance with the rules of court will not be noticed: *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489.

CHATTEL MORTGAGES—PROPERTY NOT IN EXISTENCE. A mortgage of personal property not at the time in existence cannot, as a general rule, be upheld or enforced in a suit at law: *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486. At common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him. A mortgage of goods which the mortgagor does not own at the time of making the mortgage, though he may afterward acquire them, is void in respect to such goods as against subsequent purchasers or attaching creditors: See the monographic notes to *Moody v. Wright*, 46 Am. Dec. 712, on mortgage of after-acquired property and of property having only a potential existence; and to *Gregg v. Sanford*, 76 Am. Dec. 723, on the effect of a mortgage on after-acquired personal property. See *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045; *Lumbert v. Woodard*, 144 Ind. 335, 55 Am. St. Rep. 175, 43 N. E. 302; note to *Cook v. Prindle*, 59 Am. St. Rep. 431.

KIMBALL v. RANNEY.

[122 Mich. 160, 80 N. W. 992.]

AGENT'S PURCHASE OF HIS PRINCIPAL'S PROPERTY AT A FORECLOSURE SALE—EFFECT OF.—An agent employed to sell real estate for his principal cannot, without renouncing his agency, rightfully bid in the property for himself at a mortgage foreclosure sale thereof, even where he has given notice to his principal of his intention to purchase for himself. Such a purchase will inure to the benefit of the principal, and the agent must, in equity, account to him therefor.

AGENT'S PURCHASE OF HIS PRINCIPAL'S PROPERTY AT A FORECLOSURE SALE—RATIFICATION—ESTOPPEL—LACHES—ACCOUNTING—INTEREST.—If an agent employed to sell his principal's property bids it in for himself at a mortgage foreclosure sale thereof, the principal does not ratify the purchase, or estop himself from claiming that it inures to his own benefit, by obtaining an order for a resale of the property and afterward, being unable to comply with the conditions of the order, or to effect a settlement with the agent, accepts surplus moneys arising from the sale, and then waits several years before he files a bill against the agent for an accounting; and the defense of laches cannot prevail where the agent has, at all times after his purchase, denied the complainant's rights in the property; but the agent, in accounting for the proceeds of the transaction, is entitled to interest upon his disbursements.

Bill for an accounting and an injunction, brought by Kimball against Ranney and Balch. There was a decree against Ranney alone. The complainant and Ranney appealed.

George W. Bates, for the complainant.

Gray & Gray and Edwin F. Conely, for the defendants.

¹⁶² HOOKER, J. Heath owned certain real estate in the city of Detroit, upon which were two mortgages, aggregating about seventeen thousand dollars. Ranney, a real estate agent, was employed by Heath to sell the property, for which he was to receive a commission. There was talk between them that the value of the property would be increased if the council of the city could be induced to fix the location of a proposed street upon this property. Heath became pecuniarily involved, and on June 16, 1893, deeded the property to his father in law, Kimball. Kimball testified ¹⁶³ that the consideration for this deed was one dollar, and that he paid some taxes upon the property, amounting to eighty-two dollars. He said that there was no bargain, and that the deed was made by Heath and handed to him, and that he supposed he did it to keep it away from creditors, and that he held it for Heath's benefit. On

April 28, 1894, at Heath's direction, Kimball signed a contract with Ranney, whereby, "in consideration of services rendered in effecting the sale" of the property, it was agreed that Ranney should receive a commission of two per cent upon a sale of the property for twenty-two thousand five hundred dollars, and one-half of any sum received in excess of that price. Ranney was to pay "all expenses or costs of any kind incurred in the sale of said property, and also one-half of any assessment for paving or sidewalk that may be assessed against unsold portion of said property, when said assessment shall become due and payable; said advances being intended as part of the consideration of this contract."

The mortgage held by the Citizens' Savings Bank was in process of foreclosure in chancery, and a sale of the premises thereunder was advertised for July 14, 1894. On July 11, 1894, Ranney wrote the following letter, which Kimball admits receiving:

"Detroit, July 11, 1894.

"Charles J. Heath and Mr. Kimball.

"Gentlemen: Since my interview with you, I have made up my mind to protect my contract interests in your Woodward avenue property to the best of my ability at the sale to take place on July 14th inst., particularly as you expressed yourselves unable or unwilling to do so. I shall therefore buy the property, if I can. If I get it, I wish you would come and see me. I may be able to help you. Yours respectfully,

"F. T. RANNEY."

Kimball testified that he learned of this proposed sale from Heath upon the 9th of July, and immediately called upon Ranney, and told Ranney that he could not get the sale "off" (we suppose that he meant "postponed"), and asked Ranney why he did not do it, and stated that he ¹⁶⁴ was his agent to take care of the property; and that Ranney did not make much reply, except that he had made an effort but could not do it. Subsequently, Kimball received the letter mentioned above. Kimball then made an unsuccessful effort to get the bank to postpone the sale. The testimony shows that this could have been accomplished if he would have paid some of the interest due. At the sale Ranney bid in the property, subject to the other mortgage, for about forty dollars more than the amount due and costs. Kimball saw him after the sale, and told him he supposed he had purchased it in his (Kimball's) interest as well as his own; and he said, "Oh, no; that is my property now,"

and that he did not intend to divide it with them, i. e., Kimball and Heath. Kimball then said, "Haven't I got any time to redeem the property?" and Ranney, after talking over the telephone to Mr. Gray, solicitor for the complainant in the foreclosure proceeding, reported that he had eight days. Ranney procured the money to pay for the property from his father in law, Mr. Balch, and gave him a deed of the property by way of security. He subsequently obtained from him money with which he paid the other mortgage, by giving him additional security. Kimball thereupon employed counsel and made an application for a resale, and this was granted upon condition that Ranney should be paid five hundred dollars for his services (i. e., interest in the property under the contract), and that a deposit should be made to secure a promised bid for the property. These conditions were not complied with, and finally an order of confirmation was entered under a stipulation reading as follows: "It is hereby stipulated and agreed that, in the foreclosure proceedings of the Citizens' Savings Bank, referred to in the record in this cause (file No. 13,565 of the circuit court for the county of Wayne, in chancery), James E. Kimball, on August 25, 1894, filed a petition for the payment to him of the surplus moneys, of forty dollars and thirty-five cents, in court, a copy of which is hereto attached, and that on the same day an order directing such payment was entered, a copy of which is also hereto attached, and that on the same ¹⁶⁵ day said surplus was paid to him, and that the same should be considered and read in evidence upon the hearing of this cause, as if the same appeared in the return now on file."

As shown by the stipulation, Kimball received the surplus paid for the land by Ranney, amounting to forty dollars or more.

The street opening matter finally passed the council, and proceedings to condemn the land commenced late in the fall of 1894, according to Ranney's testimony. A year or so later proceedings were begun by Ranney against the city, and these were finally settled in this court in his favor. On July 23, 1895, a portion of the property was sold to Mrs. Davis for eight thousand five hundred dollars; and on May 30, 1896, Ranney sold his equity in the property to Balch, upon a settlement of their affairs. The bill in this cause was verified February 10, 1898, and asks an accounting by Ranney, and an injunction against the selling or encumbering of the premises by Ranney or Balch. The circuit court granted the relief prayed against Ranney,

and dismissed the bill as to Balch. Both complainant and defendant Ranney have appealed.

The learned circuit judge found that the contract did not require Ranney to see that the property was not sold upon the mortgages, but it was his opinion that the relation which he sustained to the property was such as to forbid its purchase upon his own behalf, to the exclusion of the complainant, and to make him a trustee for the benefit of the complainant when he acquired title. It is admitted that one who contracts to sell property for another cannot purchase for himself; but counsel assert that this is not such a case, for the reason that he did not sell to himself, or, indeed, sell at all, and that he purchased at a sale which he was powerless to avert, and only did so to protect himself against loss.

The doctrine invoked by the complainant goes further than to merely forbid a purchase by an agent from himself, and extends to all cases where the purchase by an ¹⁰⁰ agent may be an inducement to omit a duty regarding the subject of the purchase. In *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304, it was held that an agent cannot be allowed to purchase an interest in property, where he has a duty to perform which is inconsistent with the character of a purchaser. In that case the agent took a lease to himself, instead of a renewal of a former lease to his principal. In *Martin v. Wyncoop*, 12 Ind. 266, 74 Am. Dec. 209, it was held that an administrator could not purchase real estate of his testator at a sheriff's sale, for himself or another, even though it was sold on an execution in his favor levied before he assumed the trust and although it appeared that he used efforts to make the property sell for the best price possible. The case of *Fountain Coal Co. v. Phelps*, 95 Ind. 271, affirms the doctrine. In *Adams v. Sayre*, 70 Ala. 318, Adams was Sayre's agent, having control and possession of mortgaged premises, and performing the duty of managing and renting them, etc., and was his authorized agent to sell the property. He purchased the property at a foreclosure sale, and it was held that his relation was a fiduciary one as regarded the property, and that he was not permitted to traffic with the subject matter of his agency, without the consent of his principal, so as to reap a profit for himself. It was said: "The appellant was the agent of the mortgagor to sell the property, and this relationship imposed on him the manifest duty of obtaining for it the highest available price."

In *Newcomb v. Brooks*, 16 W. Va. 32, it was laid down as a general principle that "a person who occupies any fiduciary relation to another is bound not to exercise for his own benefit, and to the prejudice of the party to whom he stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such confidential relation," and that a purchase under such circumstances could be set aside by the principal at his pleasure, without any inquiry as to adequacy of price or fairness of the transaction. This is upon the principle stated by Lord Eldon (*Ex parte Lacey*, 6 Ves. 627), that: ¹⁶⁷ "Though you may see in a particular case that he [the trustee] has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. . . . The probability is that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded."

Mr. Justice Wayne said in *Michoud v. Girod*, 4 How. 555: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand toward each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interests of the other, from the faithful discharge of which duty his own personal interests may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty of trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests when he is the seller or buyer on his own account are directly conflicting with those of the person on whose account he buys or sells."

In the case of *Newcomb v. Brooks*, 16 W. Va. 32, it was said further that: "This rule is not confined to trustees and fiduciaries, in the technical meaning of the words, but it extends to every person who is within the reason of the rule—that is, to every person who by his connection with another ¹⁶⁸ person, or who by being employed or concerned in his affairs, has acquired a knowledge of his property; and any such person occupying such confidential relation to another comes within the rule we have laid down. In other words, the rule embraces every relation in which there may arise a conflict between the duty which the purchaser owes the person with whom he is dealing and his own individual interest."

Numerous authorities are there cited in support of the rule. It was held that: "A fiduciary cannot make a valid purchase of the trust property, though it be made at a public judicial sale under a decree made in an adverse proceeding. Any such purchase may be avoided, at his option, by any party to whom he holds such fiduciary relation": See *Ford v. Wright*, 114 Mich. 122, 72 N. W. 197.

It is urged in behalf of the defendant that all of these cases involve elements of fraud; but it is evident that the decisions were not based upon findings of actual fraud, but rest upon the more solid and sweeping proposition that a trustee cannot deal to his own advantage with the trust fund without the consent of the cestui que trust. Subjected to the test of this rule, we think that Ranney had no right to purchase this land, to the exclusion of the complainant, because he had duties that were incompatible with it. He was bound to sell this property as speedily and as advantageously as possible. As a purchaser, his interest was to buy as cheaply as possible. Whether yielded to or not, the impending foreclosure sale, at which he might purchase, presented a temptation to omit the performance of these duties, and delay action until the property should become his, whereby he, and not Kimball, would reap the profit arising from a sale. There is evidence in the case, by both Heath and Kimball, that defendant led them to expect, if he did not promise, that he was able to, and would, protect the title for their mutual benefit. At a late day he informed them that he could not; yet in a very few days afterward he obtained the ¹⁶⁹ money which would have protected it, by taking title and giving security upon the property. It cannot be denied that he gave complainant notice that he would purchase the property for his own benefit, while there was yet twelve or thirteen days within which he

might have redeemed, but he was unable to do it. We think it did not change the relations or make the title valid any more than it would have done had he given him that period to redeem after a confirmation of a purchase made without complainant's knowledge. The edge is sought to be taken from the rule by the claim that Ranney found it necessary to do this for the protection of his rights under the contract. His rights under the contract consisted of a prospective commission, to earn which he had made effort and possibly expended some money, though the latter does not appear. But the sequel has shown, what must have been apparent then, that he could safely have taken care of his own rights without depriving the complainant of his.

Kimball obtained an order for a resale, and finding that he could not comply with the conditions, or that it would not pay him to do so, took the surplus of the purchase price, and then waited three or four years before instituting proceedings. It is contended that these things amount to a recognition of Ranney's rights and a ratification of the sale, and that in any event his laches should estop him from making this claim. The record shows that complainant tried to adjust this matter satisfactorily. He applied for a resale in the hope that he could save something from the property after his vain effort to effect a redemption within the short period allowed. He sent his attorney to Ranney, offering to pay the amount of his bid and one hundred dollars additional for the redemption of the property, but was refused. After the sale was confirmed he or his counsel took the money remaining after payment of the mortgagee, but for this he is ready to account. We think these things do not estop him from claiming that Ranney bought the property for their mutual benefit. Ranney has not relied upon, or been misled or injured by, them.

Nor do we think the defense of laches should prevail. ¹⁷⁰ Ranney was under no obligation to buy this property. He professes to have done so for his own benefit, but so does any agent who buys his principal's land with a view to profit. At all events, he bought it, and the law says that he purchased for the benefit of his cestui que trust. Ordinarily, a purchase with such design is meritorious, and the trustee is only required to give the cestui que trust the proceeds. But here there was no such design, and, upon the contrary, the trustee has set up, and at all times maintained, an unlawful claim. He now says, in effect, that such gratuitous interference gave him the right

to say to complainant: "I now have a deed of your property. You must at once relieve me of this burden which I have voluntarily assumed, or your laches will make my title perfect." We do not take this view of the matter. For his own purposes, Ranney chose to take the property, trusting to his ability to realize from it. He did not ask complainant to relieve him from his burden. On the contrary, he denied his right to do so, and refused the offer made by complainant's solicitor, which appears to have been made in good faith, and in the belief that it could be performed. He told complainant the land was his, subject to a right to redeem within eight days. When asked if he "would send complainant to the poorhouse," he replied that "business is business." Thereupon he was allowed to sell the property, and complainant now asks the court to give him the trust fund. We concur in the opinion of the circuit court that he is entitled to what is left after reimbursing Mr. Ranney. In addition to the items allowed Mr. Ranney by the decree, we think that he is entitled to interest upon his disbursements, the amount of which should be deducted from the amount of decree. The decree of the circuit court will be modified in this particular, and in other respects affirmed. As the record contains no computation of the amount to be deducted for interest, it will be determined on the settlement of the decree, if counsel do not sooner agree upon it. The defendant will recover costs of this court.

The other justices concurred.

Purchase by Agent of Property of Principal.

Application of Equitable Principles.—It is a rule in equity that no party is permitted to purchase an interest in property and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use: *Voorhees v. Presbyterian Church*, 5 How. Pr. 58, 65; *Van Epps v. Van Epps*, 9 Paige, 237; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Hawley v. Cramer*, 4 Cow. 717. Thus, a trustee or person acting in a fiduciary character for the benefit of others cannot become a purchaser at his own sale, or acquire any interest in the property sold without the express consent of his principal, or a special permission given by a court of competent jurisdiction: *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. Rep. 1331. Such persons cannot purchase at their own sales, either directly or indirectly, and, if they do, their purchase is for the benefit of the cestui que trust, and will be set aside on the proper and reasonable application of the parties interested: *Hoffman etc. Coal Co. v. Cumberland etc. Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Freeman v. Harwood*, 49 Me. 195; *Ricketts v.*

Montgomery, 15 Md. 46, 49; Jamison v. Glascock, 29 Mo. 191, 195; Torrey v. Bank of Orleans, 9 Paige, 649; Dodd v. Wakeman, 26 N. J. Eq. 484; Marshall v. Carson, 38 N. J. Eq. 250, 255, 48 Am. Rep. 319; Ryle v. Ryle, 41 N. J. Eq. 582, 601, 7 Atl. 484; Lytle v. Beveridge, 58 N. Y. 592, 606; Everett v. Henry, 67 Tex. 402, 3 S. W. 566; Newcomb v. Brooks, 16 W. Va. 32; Cook v. Berlin etc. Mill Co., 43 Wis. 433; Chapin v. Wood, Clarke Ch. 464.

And the principle that a trustee cannot, either directly or indirectly, become a purchaser of the trust property applies to other agents: Lytle v. Beveridge, 58 N. Y. 592, 606; Gardner v. Ogden, 22 N. Y. 327, 348, 78 Am. Dec. 192, and note; Veazle v. Williams, 8 How. 134, 151; Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Moore v. Moore, 4 Sand. Ch. 37, 48; not only where the agency is strictly private in its nature, but also where it is of a public or quasi public character. Public or quasi public agents will not be permitted to purchase, either directly or indirectly, the rights or property intrusted to them and which they are authorized in that capacity to sell. This rule applies to administrators: Martin v. Wyncoop, 12 Ind. 266, 74 Am. Dec. 209; Mulford v. Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Green v. Sargeant, 23 Vt. 466, 56 Am. Dec. 88; Pearson v. Moreland, 7 Smedes & M. 609, 45 Am. Dec. 319; Planters' Bank v. Neely, 7 How. 80, 40 Am. Dec. 51; Hoitt v. Webb, 36 N. H. 158; Hoffman v. Harrington, 28 Mich. 90, 106; Sheldon v. Rice, 30 Mich. 296, 18 Am. Rep. 136; Ford v. Wright, 114 Mich. 122, 72 N. W. 197; McGowan v. McGowan, 48 Miss. 553; Caldwell v. Caldwell, 45 Ohio St. 512, 15 N. E. 297; Coat v. Coat, 63 Ill. 73; Kruse v. Steffens, 47 Ill. 112; Smith v. Drake, 23 N. J. Eq. 302; Obert v. Hammel, 18 N. J. L. 74; and see discussion in Newcomb v. Brooks, 16 W. Va. 32, 63; assignees in bankruptcy, or for the benefit of creditors: Ex parte Lacey, 6 Ves. 625; Campbell v. McLain, 51 Pa. St. 200; Ex parte Bennett, 10 Ves. 381; commissioners to sell land: Ingerson v. Starkweather, Walk. (Mich.) 346; county treasurers having charge of sales of land for delinquent taxes: Clute v. Barron, 2 Mich. 192; executors: Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Scott v. Gorton, 14 La. 115, 33 Am. Dec. 578; Jennison v. Hapgood, 7 Pick. 1, 19 Am. Dec. 258; McGowan v. McGowan, 48 Miss. 553; Obert v. Hammel, 18 N. J. L. 73; Lytle v. Beveridge, 58 N. Y. 592, 606; Michoud v. Girod, 4 How. 503, 553; Rogers v. Rogers, Hopk. Ch. 515, 523; Winter v. Geroe, 5 N. J. Eq. 319; Davoue v. Fanning, 2 Johns. Ch. 252; Ex parte James, 8 Ves. 335, 346; and see discussion in Newcomb v. Brooks, 16 W. Va. 32, 63; guardians: Stiles v. Beeman, 1 Lans. 90, 98; Patton v. Thompson, 2 Jones Eq. 285; Scott v. Freeland, 7 Smedes & M. 409, 45 Am. Dec. 310; Obert v. Hammel, 18 N. J. L. 73; Ford v. Wright, 114 Mich. 122, 72 N. W. 197; judges of probate, who have ordered sales of real estate: Walton v. Torrey, Harr. (Mich.) 259; public officers, such as members of a board of freeholders: People v. Township Board, 11 Mich. 222;

receivers: Carr v. Houser, 46 Ga. 477; sheriffs: Mills v. Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Carter v. Harris, 4 Rand. 199; sheriff's deputy: Perkins v. Thompson, 3 N. H. 144; tax collectors: Chandler v. Moulton, 33 Vt. 245; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; and trustees: Robertson v. Western etc. Fire Ins. Co., 19 La. 227, 36 Am. Dec. 673; Green v. Winter, 1 Johns. Ch. 27, 7 Am. Dec. 475; Davoue v. Fanning, 2 Johns. Ch. 252, 257.

Executors, administrators, guardians, or trustees, intrusted with the selling of real estate, can never sell it to themselves, either directly and openly, or secretly and covertly through another person employed for the purpose. "Every such sale," says Ford, J., in Obert v. Hammel, 18 N. J. L. 73, 81, "must be considered absolutely void in a court of common law, because it has not the power of converting the purchaser into an accountable trustee: whereas, a court of equity will sometimes affirm the sale, and give a better remedy for the fraud, by making the purchaser give up all the profits he has made by it." See, also, Clute v. Barron, 2 Mich. 192, holding a treasurer's sale of land to himself for delinquent taxes to be a nullity; and Scott v. Gorton, 14 La. 115, 33 Am. Dec. 576, holding that a purchase by an executrix at a sale of the estate under her charge, unless the sale is for the purpose of partition, is null and void. It has been held, however, that a purchase by a tax collector at his own sale is not absolutely void, but voidable, at the option of the owner of the property: Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; that a purchase by trustees of the property of the cestui que trust, whether made at public or private sale, is voidable only; and that the cestui que trust must make his election to set aside such purchase within a reasonable time: Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435.

An agent has duties of a fiduciary character to perform and cannot, as a rule, be permitted to purchase property confided to his care: Stewart v. Duffy, 116 Ill. 47, 6 N. E. 424; Church v. Marine Ins. Co., 1 Mason, 341, 345, Fed. Cas. No. 2,711. It is an equitable rule of universal application that no person can be permitted to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser: Torrey v. Bank of Orleans, 9 Paige, 649; Van Epps v. Van Epps, 9 Paige, 237; Lytle v. Beveridge, 58 N. Y. 592, 606; Voorhees v. Presbyterian Church, 5 How. Pr. 58, 65; Hawley v. Cramer, 4 Cow. 717.

Agent to Sell Cannot Buy.—An agent to sell property cannot be both seller and buyer, without the assent of his principal: Finnerly v. Fritz, 5 Colo. 174; Michoud v. Girod, 4 How. 503; Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. Rep. 741; Bentley v. Craven, 18 Beav. 75; and the rule is that an agent cannot, either directly or indirectly, without his principal's knowledge and consent, become a purchaser of the property of his principal, intrusted

to him to sell, and cannot maintain a title thus acquired as against his principal. The latter may either repudiate the transaction altogether or adopt and take the benefit of it: *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. Rep. 741; *Bentley v. Craven*, 18 Beav. 75; *McKinley v. Irvine*, 13 Ala. 681; *Walker v. Palmer*, 24 Ala. 358; *White v. Ward*, 26 Ark. 445; *Rogers v. Lockett*, 28 Ark. 290; *Banks v. Judah*, 8 Conn. 145; *Roe v. Doe*, 31 Ga. 554; *Robbins v. Butler*, 24 Ill. 387; *Kerfoot v. Hyman*, 52 Ill. 512; *Eldridge v. Walker*, 60 Ill. 230; *Mason v. Bauman*, 62 Ill. 76; *Tewksbury v. Spruance*, 75 Ill. 187; *Francis v. Kerker*, 85 Ill. 190; *Ingle v. Hartman*, 37 Iowa, 274; *Robertson v. Western etc. Fire Ins. Co.*, 19 La. 227, 36 Am. Dec. 673; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Moore v. Mandlebaum*, 8 Mich. 433; *People v. Township Board*, 11 Mich. 222; *Tilleny v. Wolverton*, 50 Minn. 419, 52 N. W. 909; *Bain v. Brown*, 56 N. Y. 285; *Cumberland etc. Iron Co. v. Sherman*, 30 Barb. 553; *Deep River etc. Min. Co. v. Fox*, 4 Ired. Eq. 61; *Savage v. Savage*, 12 Or. 459, 8 Pac. 754; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Shannon v. Marmaduke*, 14 Tex. 217; *Scott v. Mann*, 36 Tex. 157; *Satterthwaite v. Loomis*, 81 Tex. 64, 16 S. W. 616; *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *Stewart v. Mather*, 32 Wis. 344, 355.

Thus, an agent to sell or trade personal property cannot, directly or indirectly, sell or trade it to himself; nor can he acquire title thereto by raffling the property and becoming the winner at the raffle: *Hodgson v. Raphael*, 105 Ga. 480, 30 S. E. 416. An agent to sell goods cannot sell to himself, even at a public sale, and no actual fraud appears: *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236. A special agent to whom a horse is delivered for the purpose of sale has no authority to apply the same to the payment of his own debts: *Parsons v. Webb*, 8 Greenl. 38, 22 Am. Dec. 220. And an agent employed to sell a reversionary legacy will not be permitted to be a purchaser thereof at an undervalue: *Crowe v. Ballard*, 2 Cox, 253. The master of a vessel, being an agent to sell an interest therein, cannot himself be the purchaser: *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 204; and see *Church v. Marine Ins. Co.*, 1 Mason, 340, 344, Fed. Cas. No. 2,711; *Ricketts v. Montgomery*, 15 Md. 46; *Parker v. Vose*, 45 Me. 54; *Barker v. Marine Ins. Co.*, 2 Mason, 269, Fed. Cas. No. 992.

Brokers employed to sell land, even at an agreed price, on commission, cannot buy for themselves at the price named: *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246. An agent to sell land cannot sell to himself: *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268. Such a purchase is fraudulent upon its face: *White v. Ward*, 26 Ark. 445; *Rogers v. Lockett*, 28 Ark. 290. If a contemplated purchaser of land refuses to take it, the agent for its sale, having a deed with the name of the grantee left in blank, cannot lawfully purchase the land by inserting the name of his wife in the blank, without her knowledge, and paying the amount for which it was

understood the land should be sold: *McNutt v. Dix*, 83 Mich. 328, 47 N. W. 212. See, also, *Smitz v. Leopold*, 51 Minn. 455, 53 N. W. 719. An agent empowered to sell cannot convey the property to his wife as her separate estate through the aid of a third person, without the knowledge and consent of his principal, and the latter may avoid such conveyance at his election, no matter whether the price paid was adequate or not: *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97, 21 N. E. 193. A deed by an agent, under power to sell and convey his principal's land, conveying it to the agent's wife as her separate property, is void, because such agent cannot sell, either directly or indirectly, to himself: *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824, 17 S. W. 79. An attorney for absent heirs cannot purchase their property for himself: *Hobson v. Peake*, 44 La Ann. 383, 10 South. 762. An agent having control of real property, with power to sell, cannot lawfully purchase it at a mortgage sale and hold it against his principal, especially where he, by private agreement, induced the mortgagee not to bid against him: *Adams v. Sayre*, 70 Ala. 318. An agent to collect a mortgage cannot purchase the mortgaged premises at a foreclosure sale for his own benefit: *Moore v. Moore*, 5 N. Y. 256, 4 Sand. Ch. 37.

An agent to sell cannot purchase the property of his principal through a third person, for the law will not allow him to do indirectly what it will not permit him to do directly: *Finnerty v. Fritz*, 5 Colo. 174; *Hughes v. Washington*, 72 Ill. 84; *Smith v. Townsend*, 109 Mass. 500. Thus, the clerk of an agent to sell lands, who is employed or concerned in the affairs of the seller relating to the lands, is, alike with his principal, prohibited from purchasing, and, if he does so, the seller may compel him to reconvey the lands or account for their proceeds: *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192. The law will not permit an agent to sell to be secretly connected with the purchaser, by any arrangement between them, concerning the property, which will redound to the benefit of the agent: *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80; *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549. A husband who is an agent to sell land has no power to make a valid sale thereof to his wife: *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022; nor is an agent to sell authorized to sell property to a firm of which he is a member: *Francis v. Kerker*, 85 Ill. 190; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; or to buy it himself through a partner: *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; and he is not authorized to purchase for himself jointly with an ostensible purchaser: *Hughes v. Washington*, 72 Ill. 84; and see *Smith v. Townsend*, 109 Mass. 500. So, if two persons own real estate, and one of them is intrusted with its sale, he is an agent of the other owner, and cannot convey it to a third person for the price agreed upon, and pay the money himself with a view of acquiring title to the property: *Eldridge v. Walker*, 60 Ill. 230.

Meaning of Rule and Reasons for It.—The general principle that an agent to sell cannot buy for himself must be understood to mean that an agent, authorized to sell the property of his principal, cannot become the purchaser of it through the instrumentality of his agency, either directly or indirectly: *Pridgen v. Adkins*, 25 Tex. 389, 394. A selling agent cannot depart from what he is hired to do: *Upton v. Suffolk Co. Mills*, 11 Cush. 586, 59 Am. Dec. 163; and it is his duty to sell to third persons, not to himself: *Butcher v. Krauth*, 14 Bush, 713; *Anderson v. First Nat. Bank*, 6 N. Dak. 497, 509, 72 N. W. 916. Authority to sell property is not authority to buy it: *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358; and an agent to sell cannot act in a double capacity, or contract with himself: *People v. Township Board*, 11 Mich. 222. There is no inference in doubtful cases that an agent to sell has power to buy: *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246. It is the duty of an agent to sell to get the highest fair price, and this duty is so wholly incompatible with his wish to buy that the law will not allow him to unite the two opposite characters of buyer and seller: *Parker v. Vose*, 45 Me. 54, 60; *McDonald v. Lord*, 26 How. Pr. 404; *Michoud v. Girod*, 4 How. 503, 553; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Bent v. Priest*, 86 Mo. 475; *People v. Township Board*, 11 Mich. 222; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; irrespective of the fairness or unfairness of the transaction: *Banks v. Judah*, 8 Conn. 145, 157; *Mills v. Goodsell*, 5 Conn. 475, 13 Am. Dec. 90; and it is immaterial that the agent has an interest in the property to be sold: *White v. Ward*, 26 Ark. 445; *Michoud v. Girod*, 4 How. 503, 553. An agent to sell cannot become a purchaser in his own name or that of another, whether the sale is public or private: *Ingerson v. Starkweather*, Walk. Ch. 346; *Moore v. Moore*, 5 N. Y. 256, affirming the same case, 4 Sand. Ch. 37; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236. Where an agent to sell buys the property sold by him, the law does not concern itself with any question of injury to the principal. The agent can, under no circumstances, become a purchaser thereof without the consent of the principal, unless expressly authorized by law: *Anderson v. First Nat. Bank*, 6 N. Dak. 497, 509, 72 N. W. 916; *Ames v. Port Huron etc. Booming Co.*, 11 Mich. 139, 83 Am. Dec. 731.

"The general interests of justice," says Van Fleet, V. C., in *Porter v. Woodruff*, 36 N. J. Eq. 174, 179, "and the safety of those who are compelled to repose confidence in others alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer, and places himself in a position toward his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the par-

ticular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent, but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own. In such cases, the courts do not stop to inquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative; they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed and the prohibition against an agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud." See, also, *Lingke v. Wilkinson*, 57 N. Y. 445, 450, and compare *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304, wherein it is said that the law does not presume that a purchase by an agent to sell of the property sold by him will always be impressed with fraud, but the transaction "furnishes an inducement to fraud, and affords opportunities to persons who should always act with the most conscientious and scrupulous good

faith to abuse their trust; and therefore a total disability is enjoined, to take away all temptation."

Various Kinds of Private Agents.—An Attorney at Law is not, upon principles of public policy, permitted to purchase anything in litigation, of which litigation he has the management: *Hall v. Hallet*, 1 Cox, 134; and in *Ex parte James*, 8 Ves. 337, a petition in bankruptcy, Lord Eldon set aside a purchase made by a solicitor, who had been employed by the assignees in the business of the estate, although the sale was perfectly fair, and the purchase sanctioned by most of the persons interested in the estate, the amount bid being, at the time of sale, considered the full value of the premises. "This doctrine," observed the lord chancellor, "as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases": *Ex parte James*, 8 Ves. 337. It seems, too, that an attorney who issues an execution cannot become a purchaser at the sheriff's sale, either on his own account or as the agent of a third person, without the consent of his client, especially where the latter's debt is left unsatisfied, as such a transaction is against the client's interests: *Hawley v. Cramer*, 4 Cow. 717, 739. If a client's property, real or personal, is sold in the process of a suit, his attorney cannot be permitted to purchase it without the express consent of the client: *Newcomb v. Brooks*, 16 W. Va. 32, 69. Compare *Cleveland v. Miller*, 94 Mich. 97, 53 N. W. 96; and an attorney at law cannot purchase property, real or personal, at a judicial sale, whether made by a commissioner of the court or by a sheriff, after a judgment has been obtained and an execution issued, when his client might sustain an injury by his being a purchaser: *Newcomb v. Brooks*, 16 W. Va. 32, 65.

If an Attorney in Fact executes a deed in the name of his principal and the grantee therein, on the same day, by another deed, conveys the same land back to the attorney in fact, both deeds are prima facie fraudulent and void upon their face, and the principal is not bound by them, but may repudiate the conveyances, and recover the land in an action of ejectment, for where the misfeasance or fraud of an agent or trustee appears upon the face of his conveyances, the remedy may be administered in a court of law as well as in a court of equity: *McKay v. Williams*, 67 Mich. 547, 11 Am. St. Rep. 597, 35 N. W. 159. If an agent, by virtue of a power of attorney, conveys his principal's property, taking a conveyance to himself, and then mortgages it, he does not acquire title to the property, as against the principal, by such use of the power: *Cleveland Ins. Co. v. Reed*, 1 Biss. 180, Fed. Cas. No. 2889.

Auction Sales.—An agent to sell property cannot buy at an auction sale thereof, either by himself or through a third party, even for value and however fair may be the sale: *Randall v. Lautenberger* (R. L., Feb. 18, 1888), 13 Atl. 100; *Patton v. Thompson*, 2 Jones Eq. 285; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Oliver v. Court*, 8 Price, 127; *Jones v. Hoyt*, 23 Conn. 157; *Church v. Marine Ins. Co.*, 1 Mason, 341, Fed. Cas. No. 2 711; *Veazie v. Williams*, 8 How. 134, 151; *Matthews v. Light*, 32 Me. 305; *Parker v. Vose*, 45 Me. 54; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Porter v. Woodruff*, 36 N. J. Eq. 174. An auctioneer, acting in a fiduciary capacity, or through the instrumentality of his agency, will not be allowed to bid off for himself or anyone else the very property he is selling: *Scott v. Mann*, 36 Tex. 157; *Veazie v. Williams*, 8 How. 134, 151; *Oliver v. Court*, 8 Price, 127; *Brock v. Rice*, 27 Gratt. 812; though one who is not intrusted with the conduct of a sale, but who acts simply as an auctioneer or crier for an officer, and in his presence, at a sale of property under a writ, has a right to bid at the sale, either for himself or a third party: *Swires v. Brotherline*, 41 Pa. St. 135, 80 Am. Dec. 601; *Scott v. Mann*, 36 Tex. 157.

A *Factor* cannot unite the opposite characters of buyer and seller, unless this relation with his principal has been dissolved, or there is a deliberate agreement between them to that effect: *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600; and he cannot sell property intrusted to his care to a copartnership of which he is a member: *Martin v. Moulton*, 8 N. H. 504.

Unauthorized Sales—Validity—Ratification—Remedy.—A trustee's purchase, for his own benefit, at a sale of the trust property is not void; it will bind the cestui que trust if he acquiesce, but if he dissents in a reasonable time, the trustee will be considered as holding for him: *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258. Such a purchase is not absolutely void. It is only voidable, and may be confirmed by the parties interested, directly or by long acquiescence, or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the cestui que trust: *Hammond v. Hopkins*, 143 U. S. 224, 251, 12 Sup. Ct. Rep. 418, 427; *Hoyt v. Latham*, 143 U. S. 553, 566, 12 Sup. Ct. Rep. 568, 572; *People v. Township Board*, 11 Mich. 222, 229; *Eastern Bank v. Taylor*, 41 Ala. 93, 100; *Beesom v. Beesom*, 9 Pa. St. 279; *Michoud v. Girod*, 4 How. 503. So it is where an agent to sell makes an unauthorized sale of property to himself. If he makes a purchase in violation of his duty to his principal, it is apparently held, in some cases, to be absolutely void: *Clute v. Barron*, 2 Mich. 192, 198; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Barker v. Marine Ins. Co.*, 2 Mason, 269, Fed. Cas. 922; *Banks v. Judah*, 8 Conn. 145; but the weight of authority is to the effect that the purchase by the agent is not absolutely void, but may be effectual and valid, either by the express ratification of the principal, with a knowledge of all the facts, or by the princi-

pal's acquiescence for a great length of time, with a like knowledge of the facts. The ratification, however, must be with knowledge of every fact, or the principal is not bound thereby: *Pridgen v. Adkins*, 25 Tex. 389, 395; *Bassett v. Brown*, 105 Mass. 551; *Francis v. Kerker*, 85 Ill. 190; *Marsh v. Whitmore*, 21 Wall. 178; *Hoffman etc. Coal Co. v. Cumberland etc. Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472; *Field v. Small*, 17 Colo. 386, 30 Pac. 1034; *New Ebenezer Assn. v. Gress Lumber Co.*, 89 Ga. 125, 14 S. E. 892; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349, 24 South. 480; *Johnson v. Carrere*, 45 La. Ann. 847, 13 South. 195; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 203; *Campbell v. McLain*, 51 Pa. St. 200; *Crowe v. Ballard*, 2 Cox, 253; *Gainess v. Acre*, Minor, 141. As said in *Eastern Bank v. Taylor*, 41 Ala. 93, 100: "A purchase by an agent or trustee at his own sale is valid, except as to the principal or cestui que trust, and is not absolutely void, but void at the election of such principal or cestui que trust seasonably expressed, and is capable of confirmation, so that it cannot be avoided." If material facts, however, be either suppressed or unknown, the ratification is invalid, because founded in mistake or fraud: *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349, 24 South. 480, and numerous cases therein cited.

An agent or other person acting in a fiduciary capacity cannot speculate for his gain, and to the prejudice of his principal, in the subject matter committed to his care: *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Wheeler v. Ryon*, 1 App. Cas. D. C. 142. Hence, if an agent to sell effects a sale to himself, either directly or under cover of the name of a third person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter seasonably made, will be compelled to surrender it, or if he has disposed of it to a bona fide purchaser, to account, not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although no fraud is shown and it does not appear that the property, at the time of its acquisition by the agent, was worth more than he paid for it: *Smitz v. Leopold*, 51 Minn. 455, 53 N. W. 719; *Bent v. Priest*, 86 Mo. 475, 482; *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. 168; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236; *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. Rep. 741; *Chaffin v. Hull*, 49 Fed. 524; *White v. Ward*, 26 Ark. 445; *Hobday v. Peters*, 28 Beav. 349; *Jones v. Hoyt*, 23 Conn. 165; *Hobson v. Peake*, 44 La. Ann. 383, 10 South. 762; *Wilson v. Wilson*, 4 Abb. App. Dec. 621; *Clute v. Barron*, 2 Mich. 199; *Hawley v. Cramer*, 4 Cow. 717, 744; *Tynes v. Grimstead*, 1 Tenn. Ch. 508. Such a purchase may be set aside, at the option of the principal, without reference to its advantages, fairness, or reasonableness, where the rights of innocent purchasers and creditors have not intervened: *Quarter-*

mous v. Taylor, 62 Ark. 598, 37 S. W. 229; Tynes v. Grimstead, 1 Tenn. Ch. 508; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854; Eldridge v. Walker, 60 Ill. 230; Glenwood v. Spring, 54 Barb. 375; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85, 91; Porter v. Woodruff, 36 N. J. Eq. 174; Newcomb v. Brooks, 16 W. Va. 32, 62. Where an agent to sell sells to himself, either directly or indirectly, the property of his principal, the burden of proof is on him to show the knowledge and consent of his principal, even where no fraud was intended or he derived no advantage from the transaction: Tyler v. Sanborn, 128 Ill. 136, 15 Am. St. Rep. 97, 21 N. E. 193; Jansen v. Williams, 36 Neb. 869, 55 N. W. 279; Fountain Coal Co. v. Phelps, 95 Ind. 271; McGar v. Adams, 65 Ala. 106; Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. Rep. 741. If the agent sells land and causes a conveyance to be made to himself, it will, unless ratified by the principal, be set aside by a court of equity, upon a seasonable application made by the principal or his heirs, without any inquiry as to its fairness: Sturdevant v. Pike, 1 Ind. 276.

If an agent sells to himself the property of his principal, one who purchases from the agent with notice of the facts holds as trustee for the principal, and stands in no better position than the agent: Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; Cumberland etc. Iron Co. v. Sherman, 30 Barb. 553. If an agent to sell purchases the principal's property, the principal must repudiate within a reasonable time, or he will be held to have ratified the agent's act: Francis v. Kerker, 85 Ill. 190; Marsh v. Whitmore, 21 Wall. 178; Bassett v. Brown, 105 Mass. 551; Glenwood v. Spring, 54 Barb. 375; Breed v. First Nat. Bank, 6 Colo. 235. The question as to what constitutes a reasonable time in any particular case of the kind must be determined from a consideration of all its elements which affect that question: Twin-Lick Oil Co. v. Marbury, 91 U. S. 587. The principal cannot repudiate such a sale, however, without doing equity: Adams v. Sayre, 76 Ala. 509; that is, he must, in general, make such compensation as will place the agent in statu quo: People v. Township Board, 11 Mich. 222, 229.

When Agent may Buy His Principal's Property.—While an agent intrusted to sell real estate cannot, directly or indirectly, become its purchaser under the power conferred on him, the agent has the same right to deal directly with his principal as has a stranger, though a purchase by an agent from his principal is viewed with great jealousy by the courts: Dobson v. Racey, 8 N. Y. 216; Burke v. Bours, 98 Cal. 171, 32 Pac. 980; Cook v. Berlin Woolen Mill Co., 43 Wis. 433; Uhlich v. Muhlke, 61 Ill. 499; Boyd v. Hawkins, 2 Dev. Eq. 195. An agent, therefore, even where he has been authorized to sell the property of his principal, may purchase it directly from the latter, where he acts in good faith, makes a full disclosure of all the facts concerning the property, and takes no advantage of the situation; and such a purchase will be upheld

where the transaction is fair and just, the consideration full and adequate, and the sale is made to the agent with the principal's full knowledge and consent: *Fisher's Appeal*, 34 Pa. St. 29; *Burke v. Bours*, 98 Cal. 171, 32 Pac. 980; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Kramer v. Winslow*, 154 Pa. St. 637, 25 Atl. 766; *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279; *Ingle v. Hartman*, 37 Iowa, 274; *Gumbel v. Boyer*, 46 La. Ann. 762, 15 South. 84; otherwise, the principal may repudiate the transaction and have it set aside: *Ingle v. Hartman*, 37 Iowa, 274; *Farnam v. Brooks*, 9 Pick. 212; *Jeffries v. Wiester*, 2 Saw. 135, Fed. Cas. No. 7254; *Ferguson v. Dent*, 24 Fed. 412; *Wenham v. Switzer*, 51 Fed. 351; *McDonald v. Fithian*, 1 Gilm. 269; *Porter v. Woodruff*, 36 N. J. Eq. 174.

For instance, if a general, confidential business agent is requested by his principal to find a purchaser at a fixed price for certain land, but is unable to do so, a purchase thereof made by him directly from the principal is valid, where he purchases for the price named, which at the time is a fair one, he having previously communicated to his principal all the facts within his knowledge about the land and its value, without concealing or misrepresenting anything: *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203. So, an agent to sell, who makes a sale of his principal's property, and who has no intention at the time of sale of going in with the purchaser, may afterward make a valid purchase of the latter: *Robertson v. Chapman*, 152 U. S. 673, 14 Sup. Ct. Rep. 741; unless he becomes interested in the purchase immediately after the sale and before the payment of the purchase money: *Rosenberger's Appeal*, 26 Pa. St. 67. There are contracts made directly between an agent and his principal which the courts will uphold, "but such transactions, to be maintained, must be characterized by the utmost good faith. There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent, which might influence the principal, and the burden of establishing the perfect fairness of the contract, in such cases, rests upon the agent": *Porter v. Woodruff*, 36 N. J. Eq. 174, 181.

On the other hand, if an agent employed to sell a tract of land becomes himself the purchaser from his principal, from whom he conceals the fact that a higher price could be obtained, he is guilty of a fraud, which will render the purchase void: *Moseley v. Buck*, 3 Munf. 232, 5 Am. Dec. 508. So, if an ostensible purchaser enters into an arrangement with the agent to buy the land, in reality for the joint benefit of himself and the agent, the transaction is a fraud, which will enable the vendor, upon being apprised of the fact, to rescind the sale and reclaim the land: *Glover v. Layton*, 145 Ill. 92, 34 N. E. 53. And if an agent, who is authorized to

sell real estate, resorts to a subterfuge and fraudulently purchases the land for less than its value from his principal in another's name, after having concealed from the principal material facts concerning the value of the property to be sold, the agent cannot hold the land; but the principal cannot regain it on the ground of fraud where the agent, in good faith, and without any design to obtain the property for himself, sold it to the purchaser, reported the sale to his principal, and, after ratification by the latter, purchased the land from the buyer: *Bookwalter v. Lansing*, 23 Neb. 291, 36 N. W. 549.

The principle that an agent employed to sell property cannot himself become the purchaser at his own sale, either directly or indirectly, or by collusion with others, does not apply where the agent acquires an interest in the property after the termination of the agency by subsequent contract with the purchaser at his sale, for he then has the same right as any other person to deal in the property, and may purchase it if he desires to do so: *McGar v. Adams*, 65 Ala. 106; *Walker v. Derby*, 5 Biss. 134, Fed. Cas. No. 17,068; *Walker v. Carrington*, 74 Ill. 446; *O'Reiley v. Bevington*, 155 Mass. 72, 29 N. E. 54; *Bucher v. Bucher*, 86 Ill. 377; *McKinley v. Irvine*, 13 Ala. 681; *Satterthwaite v. Loomis*, 81 Tex. 64, 16 S. W. 616; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433, 440. An agent cannot acquire title to his principal's property, sold at a sheriff's sale, by purchasing it thereat, without first severing the relation between himself and his principal. If any doubt exists as to his attitude toward the principal, he will be deemed a trustee for the latter; and if he attempts to sever the relation by notice, he must assume the burden of showing that his principal was notified of the altered relation: *Fountain Oil Co. v. Phelps*, 95 Ind. 271. Neither can an agent acquire his principal's property by using his own money to make a purchase which is virtually a redemption of the subject matter of the agency: *De Mallagh v. De Mallagh*, 77 Cal. 126, 19 Pac. 256.

An agent having charge of land for his principal cannot, either directly or indirectly, acquire a tax title thereto, as against the latter, because of the latter's default in remitting funds to pay the taxes, without a prior distinct, unambiguous, explicit renunciation of the agency and notification to his principal. Without this, his purchase at a tax sale will inure to the benefit of the principal. In other words, the agent will be deemed a trustee for the principal: *McMahon v. McGraw*, 26 Wis. 614; *Bartholomew v. Leech*, 7 Watts, 472; *Bowman v. Officer*, 53 Iowa, 640, 6 N. W. 28; *Gonzalia v. Bartelsman*, 143 Ill. 634, 32 N. E. 532; *Krutz v. Fisher*, 8 Kan. 90; *Fisher v. Krutz*, 9 Kan. 501; *Geisinger v. Beyl*, 80 Wis. 443, 50 N. W. 501; *Fox v. Zimmerman*, 77 Wis. 414, 46 N. W. 533; *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. 211; *Smith v. Stephenson*, 45 Iowa, 645; especially where he has money of his principal to apply on taxes but fails to make such application: *Young*

v. Goodhue, 106 Iowa, 447, 76 N. W. 822. An agent employed to purchase lands at a tax sale will not, of course, be allowed to acquire title thereto, as against his principal, by taking a deed in his own name: *Matthews v. Light*, 32 Me. 305; *Comstock v. Ames*, 1 Abb. App. Dec. 411; and a public officer, such as a county treasurer or tax collector, cannot, either by himself or through an agent, acquire title to property which he sells for taxes: *Clute v. Barron*, 2 Mich. 192; *Chandler v. Moulton*, 33 Vt. 245. But the courts will sometimes refuse to disturb an agent's purchase at a tax sale where, the facts being known, a long period of time has elapsed and no measures have been taken to avoid the title: *Eckrote v. Myers*, 41 Iowa, 324; *Comstock v. Ames*, 1 Abb. App. Dec. 411.

THRONE v. MEAD.

[122 Mich. 273, 80 N. W. 1080.]

ANIMALS — SHEEP-KILLING DOGS — KILLING OF — WHEN JUSTIFIABLE.—A sheep-killing dog is not much favored in law. Hence, if it has been caught chasing lambs, and is found a few days afterward on the owner's premises in company with another dog, and unaccompanied by any person, such owner is justified in having the former dog immediately killed without waiting for it to chase the sheep again.

Sampson & Barre, for the appellant.

W. D. Fast and A. L. Guernsey, for the appellee.

273 MOORE, J. August 11, 1897, John Barger, at the request of the defendant, shot two dogs, one of which belonged to the plaintiff. Suit was brought by plaintiff against the defendant. From a judgment obtained by him the defendant has appealed.

The record discloses that plaintiff was the owner of a spayed bitch dog, about four years old, which, he testified, he kept chiefly for hunting minks and coons. He says he kept her tied up nights and a good deal of the time in the daytime. He testified he never knew she worried or killed any sheep. It was shown by some of the witnesses for the plaintiff that the dog was frequently away from home and among flocks of sheep. One of them testified that, previous to the shooting of the dogs, he had seen them chasing sheep belonging to the defendant. He saw the dog which was shot grab a buck belonging to Mr. Jackson, and soon thereafter the sheep was found dead. It

²⁷⁴ was shown on the part of the defense that, shortly before the two dogs were killed, they killed a buck and several lambs belonging to Mr. Jackson, whose farm adjoined the farm of Mr. Mead, and in July they chased the sheep of Mr. Parker, another neighbor, who drove them away. The defendant had a flock of lambs he had weaned, which he kept west of his house. He saw the dog belonging to the plaintiff chasing these lambs the first week in August, and got his gun to shoot her, but she got away before he could do so. Before the dogs were killed the defendant had been told about their killing the buck and lambs belonging to Mr. Jackson. On the morning the dogs were killed their owners were not with them. The defendant did not see the dogs until after they were killed, but his attention was called to the fact that they were on his premises by Mr. Barger; and when he got the gun he knew it was for the purpose of shooting the dog that had chased his sheep, and killed the sheep belonging to Jackson.

It is claimed by counsel for plaintiff that as the dogs had not done, or threatened to do, any damage to defendant's sheep on the day when they were shot he had no right to kill them: Citing *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513, 53 N. W. 535. An inspection of the case will show it is not in point. If the defendant had shot the dog when he saw her chasing his lambs the week before, he would have acted strictly within the provisions of the statute: 2 Comp. Laws 1897, sec. 5592. Had Mr. Mead notified the plaintiff in writing of what his dog had done to the lambs in August, it would have been his duty to have had the dog killed within forty-eight hours, and he would have subjected himself to a penalty for a failure to do so. This would have been equally true if Mr. Jackson or Mr. Parker had given him a like notice of what the dog had done to their sheep. The statute does not regard with much favor a sheep-killing dog. When the owner of sheep sees a pair of sheep-killing dogs in his inclosure, unaccompanied by any person, and has caught one of them a few days before chasing his lambs, he is ²⁷⁵ not obliged to wait until they have again begun their cruel work before he can take effective measures to protect his property. Under the undisputed facts in the case a verdict should have been directed for defendant: See *Hubbard v. Preston*, 90 Mich. 221, 30 Am. St. Rep. 426, 51 N. W. 209.

Judgment is reversed and no new trial given.

The other justices concurred.

**KILLING OF SHEEP-KILLING DOGS—WHEN JUSTIFI-
ABLE.**—For circumstances under which a sheep-killing dog may be killed, though not caught in the act of killing sheep, see the monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 295, discussing property in dogs and the remedies for its enforcement. That there is no right to kill it unless actually engaged in the act, see *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357, 45 Atl. 295.

HEILMAN v. PRUYN.

[122 Mich. 301, 81 N. W. 97.]

SALES—FRUIT TREES—BREACH OF CONTRACT.—If a purchaser orders fruit trees of certain varieties, and the vendor agrees, if they cannot be supplied, that he will furnish other varieties equally desirable, but instead of doing so furnishes trees of an inferior variety, the measure of damages is the value that would have been added to the premises if the trees had been of the varieties ordered.

DAMAGES—SALE OF FRUIT TREES—BREACH OF CONTRACT.—IT IS NO DEFENSE, in an action to recover damages of a vendor for selling to the plaintiff fruit trees of a variety inferior to that ordered by him, that the trees had been injured or killed by severe cold weather after the commencement of such action, and that the plaintiff had, therefore, suffered no damage by reason of the defendant's breach of contract.

Assumpsit by Heilman against Pruyne for breach of warranty on a sale of fruit trees. Heilman ordered of Pruyne some fruit trees, Late Crawfords and Smocks, and Pruyne agreed that if he could not supply them he would furnish other varieties equally desirable. The trees furnished were not of the variety ordered, but inferior thereto, and practically worthless. There was a judgment for the plaintiff and the defendant brought error.

Peter Doran, for the appellant.

Wolcott & Ward, for the appellee.

302 GRANT, C. J. 1. What is the measure of damages? This is the principal question. Defendant contends that the rule of damages is the money paid out for the trees, the cost of setting out and caring for them up to the time of the suit, and the use of the land which they were occupying. The court instructed the jury that the measure of damages was the value that would have been added to the premises if the trees had been of the varieties ordered. We think the court announced

the correct rule. "The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of a contract": 8 Am. & Eng. Ency. of Law, 2d ed., 546, and note 2. In *United States v. Taylor*, 35 Fed. 484, it was held that: "In an action for damages in cutting growing timber or trees the recovery is not limited to their actual value for firewood, turpentine purposes, or for timber or lumber puposes, but the actual injury to the estate by the cutting of the trees; and in determining the question it is proper to show the purpose for which the trees were designed and could have been used."

In *Stoner v. Texas etc. Ry. Co.*, 45 La. Ann. 115, 11 South. 875, it was held that the measure of damages for the destruction of ³⁰³ fruit trees by fire is not the cost of replacing them and the value of the care and labor bestowed on them, but the value of the destroyed trees at the date of the fire. The like rule was held in *Norfolk etc. R. R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236, and in *Montgomery v. Locke*, 72 Cal. 75, 13 Pac. 401. The case of *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199, 28 Am. St. Rep. 563, 30 N. E. 398, is an instructive case, and points out the distinction between the measure of damages where forest trees, fully grown, are unlawfully severed from the soil, and where nursery trees are so severed. In the former case there may be no injury to the freehold, when the value of the trees must furnish the sole measure of damages. In the latter case, when fruit trees are severed, they are of practically no value. In such cases there are two elements of damages: 1. The value of the trees cut, if they have any; and 2. The damage to the realty.

Counsel for defendant cites *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13. In this case cabbage seed was sold, warranted to be genuine Bristol cabbage seed. The seed was not as warranted. It was held that the proper measure of damages was the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage such as would ordinarily have been produced that year. Other cases of this character are cited. Where crops are raised from seeds, and mature in a few months, and the value of the land is not affected thereby, no other rule of damages can obtain. It is different, however, where fruit trees are planted which will not mature for years, which become a part of the realty, and materially add to its value. The destruction of a crop of cabbage, corn, wheat, or other annuals does not injure the land, and consequently there

can be but one rule of damages. The most of the cases cited by the defendant are cases of this character. The other cases cited involve the question of speculative damages, which is not involved in this case. It is a matter of common knowledge that lands are enhanced in value by orchards of fruit trees. They ³⁰⁴ have a value capable of estimation, for the reason that they usually yield fruit. The case is not one of speculative damages, but of enhanced value by additions to the realty. The rule of damages ought to be, and is, the same where worthless fruit trees are furnished, contrary to the warranty, as where good fruit trees are destroyed by the negligent acts of others. The purchaser has suffered the same damages in each case. Both parties must be held to have contracted with reference to the land in future years, as it would be enhanced by the existence of trees of the kind warranted. The difference between the value of the land with and without the trees is the just measure of damages: 26 Am. & Eng. Ency. of Law, 565, note 1.

2. Error is assigned upon the rejection of testimony as to the condition of the trees immediately before the trial, and after the severe winter of 1898-99. The object was to show that the trees, or many of them, had been injured or killed by the severe cold weather after this suit was brought, and to claim that plaintiff had, therefore, suffered no damage by the failure of the defendant to keep his contract. The ruling of the court was correct. The law does not permit the defendant to avoid his contract because the trees were injured or destroyed by circumstances beyond the control of the parties. The rights of the parties were to be determined by the situation of affairs at the commencement of the suit. If, by the act of God afterward, the trees were destroyed, this fact furnished no defense. If they had been valuable trees, and had been injured through the neglect of the plaintiff, the rule would be different.

Judgment affirmed.

The other justices concurred.

SALES BY NURSERYMEN — TREES — BREACH OF WARRANTY OF QUALITY.—THE MEASURE OF DAMAGES for a breach of warranty as to the kind of trees sold by a nurseryman is the difference between the value of the land occupied by the trees set out on it when the breach of the warranty is discovered, and the value the same land would have had, at the same time, if the trees ordered had been planted and cultivated instead of the kind sold and cultivated: *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

ALLEN v. BOARD OF STATE AUDITORS.

[122 Mich. 324, 81 N. W. 113.]

CONSTITUTIONAL LAW—ESTABLISHMENT OF COURTS—LEGISLATIVE POWER AS TO.—A legislature has no power to establish a court of appeals, aside from constitutional courts, to determine the guilt or innocence of a convicted criminal. Hence, it has no authority by a joint resolution to empower a board of state auditors to investigate a convicted criminal's claim of innocence, where a portion of the sentence has been served, and to allow him a moneyed compensation if it finds him innocent. Such a resolution is unconstitutional and void.

CONSTITUTIONAL LAW—LEGISLATIVE APPROPRIATIONS—REQUISITE VOTE.—A legislature cannot, by a joint resolution, appropriate the public money or property for local or private purposes, without the two-thirds vote requisite to the validity of a bill for such a purpose.

CONSTITUTIONAL LAW—SENTIMENTAL AND UNJUST CLAIMS AGAINST THE STATE ARE NOT ALLOWABLE.—A board of state auditors, authorized by the constitution to examine and adjust all claims against the state, has power to pass upon such claims only as rest upon some legal basis. It must confine itself to such claims as are contemplated by the constitution, and cannot consider one based upon sentimental or moral grounds, such as a convicted criminal's claim for damages for his wrongful conviction and imprisonment.

Edward S. Grece and Lewis M. Miller, for the relator.

Horace M. Oren, attorney general, for the respondent.

325 GRANT, C. J. The following joint resolution was passed by the legislature of 1899:

“Joint Resolution to Provide for the Relief of Thomas Allen.

“Whereas, it satisfactorily appears that Thomas Allen, now of the city of Detroit, was, on or about the twentieth day of August, 1890, arrested at the city of Grand Rapids upon the charge of ‘assault with the intent to do great bodily harm,’ and taken a prisoner to the county jail of Mecosta county, and there confined until the fourteenth day of November following, and then tried and convicted upon said charge, of which he was entirely innocent, he being at the time of the commission of the supposed crime in the city of San Francisco, California, and was sentenced upon such conviction to imprisonment in the state prison at Jackson for the term of five and one-half years; and whereas, he served upon such sentence over a year and one month before it was demonstrated that he was innocent of such offense, and received a full and unconditional pardon by the late Governor Winans; and whereas, great injustice was done

said Allen by reason of such arrest and imprisonment in the county jail of Mecosta county, trial, sentence, and imprisonment in the state prison, for which he should receive compensation; therefore, be it resolved by the senate and house of representatives of the state of Michigan that the board of state auditors shall investigate the claim of said Thomas Allen as set forth in the above preamble, and if, in the judgment of the board, the facts set forth are true, the board of state auditors are hereby authorized and empowered to audit and allow the said Thomas Allen, his heirs or assigns, a sum not to exceed ten dollars per month for a period not to exceed ten years from and after the passage of this joint resolution; and the board of state auditors are hereby authorized to draw their warrant on the state treasurer for the payment of the same.

326 "This joint resolution is ordered to take immediate effect.
"Approved May 10, 1899."

On June 21st the above resolution was presented to the board of state auditors, and the board refused to consider the claim. Petitioner then presented to this court his petition for the writ of mandamus to compel action on the part of the board.

This resolution is a most remarkable one. Nine years after conviction and sentence, the legislature, without an investigation, asserts in the preamble that the petitioner was entirely innocent of the crime for which he was convicted; that, instead of being in Michigan at the time of the commission of the crime, he was in California; that it was demonstrated, after serving a year and one month, that he was innocent; and then authorizes the board to allow him ten dollars per month for a period not exceeding ten years.

1. The first and most important question presented is, Has the legislature the power and authority to establish a court of appeals, aside from constitutional courts, to determine the guilt or innocence of a convicted criminal? Petitioner had his day in court, was defended by counsel, was given an opportunity to introduce testimony, and, in brief, was furnished all the safeguards which the constitution throws around one charged with crime. He was convicted. He did not appeal. Presumably, there was no error upon the trial. Nine years afterward the legislature makes the board of state auditors an appellate court to determine whether he was guilty or innocent, and if they should find him innocent, to allow him damages for the wrongful conviction and imprisonment. The preamble recites that his innocence was demonstrated, but to whom or how it was

demonstrated is not stated. It is not stated that the governor pardoned him because he believed him innocent. The executive of the state is not made an appellate tribunal to determine that question. When one has been convicted and sentenced by a court of competent ³²⁷ jurisdiction, from which he takes no appeal, and has not been granted a new trial, the only method provided by our constitution by which he can be relieved from the penalty imposed is by a pardon by the governor. The governor may pardon with or without good reason, with or without investigation. He is not limited by the constitution to any reason for exercising the pardoning power. Consequently, his act in pardoning and his reasons therefor have no bearing whatever upon guilt or innocence. The legislature possesses no authority to organize any tribunal for the trial of persons charged with crime other than the judicial ones authorized by the constitution. The payment by the board is conditioned upon the establishment of his innocence, which means nothing less than a determination by this board that the court which tried him erred in its judgment, and that twelve men found him guilty upon false testimony, or for some reason erred in their conclusion. It is a violation of the plain provisions of the constitution establishing courts, and conferring the exclusive jurisdiction upon them to try civil and criminal cases. Few criminals confess their guilt. The result of sustaining the validity of this resolution would be an open door for raids upon the public funds.

As already shown, the pardon is not essential to the maintenance of such claims, for the executive is not vested with power to review the judgment of courts. It would, therefore, result that, after a convict has served his sentence, five, ten, fifteen, or twenty years after his conviction, he may go to the legislature, assert that he was innocent, that he can prove it, and it may be referred to the board of state auditors, or any other number of men, public officers or private citizens, to determine whether he had a fair trial and was properly convicted. Nor is this all, but every person who is arrested and acquitted may also make his claim against the state for the wrongful arrest and detention. If such persons, when the testimony in behalf of the people is gone, will pass upon and believe the testimony which an ex-convict can introduce, he may be ³²⁸ awarded such a sum out of the state treasury as the legislature may see fit to allow, or the persons to whom such power is delegated may allow. The bare statement of the proposition is

enough to condemn it as unconstitutional, and bad in law, morals, and equity. It is unnecessary to hunt for authorities which condemn it.

2. The resolution authorizes the expenditure of the public moneys of the state for a purely private purpose. It is a mere gratuity, for which the state received nothing, but, on the contrary, incurred expense by reason of his arrest, trial, and imprisonment: *Bourn v. Hart*, 93 Cal. 321, 27 Am. St. Rep. 203, 28 Pac. 951; *Conlin v. Board of Supervisors*, 99 Cal. 17, 37 Am. St. Rep. 17, 33 Pac. 753. Section 45, article 4, of the constitution is as follows: "The assent of two-thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money or property for local or private purposes." The resolution did not receive a two-thirds vote of the members of the senate. This provision is mandatory, and cannot be evaded by calling a bill a "joint resolution." The above provision of the constitution is too clear and too valuable to be thus frittered away: *Burritt v. Commissioners of State Contracts*, 120 Ill. 322, 11 N. E. 180; *Cushing's Law and Practice of Legislative Assemblies*, 930.

3. Section 4, article 8, of the constitution provides that "the secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors to examine and adjust all claims against the state not otherwise provided for by general law." The jurisdiction conferred upon this board by this provision of the constitution clearly means claims resting upon some legal basis. "Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services": *Century Dictionary*. The legislature can only authorize this board to pass upon claims such as are contemplated by the constitution. It cannot authorize the board to ³²⁹ consider requests, petitions, or claims for appropriations which are merely gratuities, or which may be based upon sentimental or moral grounds. It is conceded by counsel for petitioner that he has not the semblance of any legal claim. The sole apology offered for such resolution is that it is based upon sentimental or moral grounds. Fortunately, the people, through their constitution, have closed the door to such sentimental and unjust claims. The people, through their constitution, have committed to the courts the sole jurisdiction to try persons charged with crime, and have made their judgments final, and have also prohibited their public funds to be squandered in mere gratuities of this character.

The writ is denied.

The other justices concurred.

CONSTITUTIONAL LAW.—THE LEGISLATURE CANNOT IMPAIR the appellate power of the supreme court given by the constitution: *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323.

CONSTITUTIONAL LAW—STATUTE—REQUISITE VOTE.—Under a constitution requiring certain laws to be passed by a two-thirds vote of the legislature, such a law, not appearing on its face to have been passed by the required vote, is void, and the objection to the law need not be pleaded: *People v. Commissioners*, 54 N. Y. 276, 13 Am. Rep. 581.

NELSON v. CRAWFORD.

[122 Mich. 466, 81 N. W. 335.]

ASSAULT—WHAT CONDUCT DOES NOT AMOUNT TO.—

If a man dresses himself in a woman's clothes, and goes at dusk to a neighbor's house, just "to have a little fun," and follows the latter's wife into her house, but makes no demonstration other than to tap the end of a parasol on the ground or floor, there is no assault, where such person does not offer or threaten to do the woman any physical injury, and it does not appear that he acts from malicious motives or with any intent to injure her.

DAMAGES—FRIGHT AS A BASIS FOR.—Fright alone, unaccompanied by any physical injury, is not a basis for damages. Hence, if a man, without any malicious motive or intending to do any wrong, dresses himself in a woman's clothes, and goes at dusk to a neighbor's house, just "to have a little fun," and follows the latter's wife into her house, but makes no demonstration other than to tap the end of a parasol on the ground or floor, the woman, though so frightened by the man's conduct as to have a miscarriage in about six weeks thereafter, attributable to such fright, cannot recover damages for such person's act, the result of which could not have been contemplated by him.

Case brought by Sarah Nelson against Crawford for personal injuries. The parties were neighbors, living on farms, and whose residences were about forty rods apart. The defendant, who had been for many years an insane or incompetent person, but harmless, dressed himself one evening in a woman's clothes, having a navy-blue bicycle skirt, light waist, sailor hat with flowers on it, and a thin, black face veil, and, taking a parasol went to the plaintiff's house. He had frequently been there as a visitor, and was accustomed to play with her children. He went on the evening in question, as he said, just "to have a little fun; to see if they had any nerve." The plaintiff saw him

coming and spoke to him, but he made no answer, and simply "mumbled." She ran into the house and called her husband, who took up a stick of wood and told the defendant to get out of the house. The plaintiff was frightened by the occurrence, and made ill, so that in about six weeks thereafter she had a miscarriage, which she attributed to such fright; but the only demonstration which the defendant had made was to tap the end of his parasol on the ground or floor, and no violence was offered or threatened. The plaintiff sought to recover damages for the injury resulting from the fright, but the court directed a verdict for the defendant, on the ground that there was no assault or attempt to do any physical injury, and that the law does not recognize fright alone, unaccompanied by any physical injury, as a basis for damages and the plaintiff brought error from a judgment for the defendant.

John Wooster and John R. Carr, for the appellant.

Charles E. Sweet, for the appellee.

407 GRANT, C. J. We think the court properly held that no violence was offered or threatened, and therefore there was no assault. The second question is new in this state. The decisions are not harmonious, and cannot well be reconciled. The court, in directing the verdict, quoted the following language from the late case of *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 110, 56 Am. St. Rep. 605, 45 N. E. 354: **468** "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest on mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injuries in determining whether they exist, . . . would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. . . . We think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury."

The damages claimed in that case were of the same character as those here claimed. The immediate effect of the fright in that case was greater, as the plaintiff became unconscious by reason of the fright. The facts were that, while plaintiff was standing upon the cross-walk of a street, awaiting an opportu-

ity to board one of the defendant's cars, and just as she was about to step upon it, the team attached to the car drew near, turned to the right, and came so close to her that, when they were stopped, she stood between the horses' heads.

Many of the cases are cited and commented on in the recent case of *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, in which it was held that no recovery for fright without physical injury is authorized by the common law or by statute. The facts of that case are much stronger for the plaintiff than are those in this case. The defendant was the landlord of plaintiff's sister; went to the house to collect rent; found the door ajar; opened it; walked upstairs; stepped inside the bedroom door; saw plaintiff sitting upon the floor; asked what she was doing, waved his arms, and in a loud and apparently angry voice said: "I forbid you moving. If you attempt to move, I will have a constable here in five minutes. I refuse to take possession of these premises." Plaintiff testified: "I was so frightened I was paralyzed with fear." Plaintiff recovered a large verdict. In its opinion the court says: ⁴⁶⁹ "These acts could not, in the ordinary course of things, have been reasonably anticipated to cause a diseased condition of appellee—to create in her a seriously diseased condition. Appellant might have reasonably anticipated that his acts would cause excitement, or even fright; but fright and excitement so seldom result in a practically incurable disease that, from the ordinary experience of mankind, such a result could not have been expected. The evidence for plaintiff was that, by reason of the excitement and fright, a condition of chorea, or St. Vitus' dance, was produced. This is shown to be a diseased physical condition resulting from mental suffering, superinduced by excitement and fright, unattended by injury to the person resulting from impact. Under the pleadings in this case mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage—a new cause of action—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it."

In *Lynch v. Knight*, 9 H. L. Cas. 577, it was held that "men-

tal pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." A very valuable discussion of the right of recovery for mental pain and suffering alone is found in *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245. That was the first case upon the subject in that court, and the rule is so well and clearly stated that we quote the language: "It is well to start from the ancient landmark, and to remember that all damage to be recovered in such cases is strictly compensatory; that while it may be possible to compensate bodily pain, and so much of mental suffering as may be indivisibly connected therewith (and this rather on authority than reason), yet that it is absolutely impossible to measure mental agony by money, and that no established ⁴⁷⁰ rule authoritatively commands such futile attempt; and consequently it must be held that so much of the instruction given herein as allowed the jury to consider the plaintiff's pain of mind, aside and distinct from his bodily suffering, was error."

Where the negligence was gross, it was held that no damages could be recovered by reason of peril and fright, because they are too remote: *Atchison etc. R. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453. Where plaintiff's horses became frightened through the negligence of the defendant, held that he could not recover for mental suffering, vexation, and anxiety of mind, in the absence of averment and proof of physical injury: *Gulf etc. Ry. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419.

These citations might be multiplied. They are sufficient to show the reasoning of the courts in support of the rule. Similar holdings were had in *West Chicago St. Ry. Co. v. Liebig*, 79 Ill. App. 567; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40, 30 Am. St. Rep. 709, 23 Atl. 340; *Victorian Railways Commrs. v. Coultas*, L. R. 13 App. Cas. 222. Some of the decisions above cited are careful to state that their opinions do not reach those cases where there was an intention to cause mental distress or to injure feelings. In some of the cases cited by the plaintiff in support of her theory the decisions are based upon the violation of a legal right, where at least nominal damages are recoverable, as in a case of the mutilation of a dead body: *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238; or the removal of a dead body from its place of burial: *Meagher v. Driscoll*, 99 Mass. 281, 96 Am.

Dec. 759; or the unlawful eviction of a tenant: *Fillebrown v. Hoar*, 124 Mass. 580. The two cases cited which most strongly support the plaintiff's contention are *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, and *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034. In *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, defendant assaulted two ⁴⁷¹ negroes in front of the house occupied by the plaintiff and her husband as tenants, thereby frightening her and causing a miscarriage. The court frankly stated that the case was a novel one, and they found no precedent for it. In *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, the correctness of the rule is admitted, but the decision is based upon the fact that there was a physical injury resulting from the confusion, commotion, and excitement upon the car.

We think the clear weight of authority supports the instruction given by the court below. In this case there is no evidence that defendant intended any wrong or contemplated, or can be held to have contemplated, the consequences alleged to have followed his acts. It was not dark. The time was between "daylight and dark." Plaintiff saw him when he was four rods from the house. Defendant was approaching plaintiff's house along the customary way. Under these circumstances and the authorities above cited, we think the instruction of the court was correct.

Judgment affirmed.

The other justices concurred.

ASSAULT—WHAT IS NOT.—There is no assault without an actual attempt to do physical violence, coupled with a present ability to carry it into execution: *Klein v. State*, 9 Ind. App. 365, 53 Am. St. Rep. 354, 36 N. E. 763; but to put another in fear of violence is an assault: *State v. Baker*, 20 R. I. 275, 78 Am. St. Rep. 863, 38 Atl. 653.

DAMAGES FOR FRIGHT AND ITS RESULTS CANNOT BE RECOVERED where there is no other injury: See the monographic note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 862, on fright as an element of recoverable damages.

PEOPLE v. WARREN.

[122 Mich. 504, 81 N. W. 360.]

TRIAL — CRIMINAL CASES — JUDGE CANNOT DIRECT VERDICT.—A trial judge cannot compel a verdict of guilty in a felony case by instructing the jury that it is their duty to return such a verdict, when some of the jurors are not willing to do so. He cannot, in so many words, direct them to bring in a verdict of guilty. Hence, it is reversible error to instruct the jury to return such a verdict; that there is nothing else for them to do; and that any individual juror who sets himself up against the plain instruction of the court violates his oath as a jurymen.

EMBEZZLEMENT BY PUBLIC OFFICERS—INTENT.—It is not necessary to constitute the offense of embezzlement by a public officer, under a statute which makes it a felony for him to knowingly and unlawfully appropriate to his own use, or to the use of any other person, money received by him in his official capacity, that there should be an intent to so appropriate it as "to forever exclude the rightful owner from its use and possession." The intention of such a statute is to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the one for which it came to him. If he does knowingly use it, or permits others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute.

WITNESSES—CROSS-EXAMINATION—CONVERSATION.—If a witness, on his examination in chief, testifies as to part of a conversation, or as to part of a transaction, the whole conversation or the whole transaction may properly be shown on cross-examination.

Conviction of a public officer for embezzlement. Exceptions before judgment.

M. L. Dunham, H. M. Dunham, J. Kirwin, and H. J. Felker, for the appellant.

Horace M. Oren, attorney general, Frank A. Rodgers, prosecuting attorney, and Rodgers, McDonald & Minor, for the people.

505 MOORE, J. The respondent was city clerk of Grand Rapids. He was charged with appropriating to his own use money belonging to the city. The case was tried before a jury. The trial judge charged the jury at length. Near the close of the charge he instructed the jury that it was their duty to return a verdict of guilty. The jury retired with an officer, and, after being out for three hours, they were brought into court, and the following occurred:

"The Court.—Mr. Clerk, you may ask the jury if they have arrived at a verdict."

"The Clerk.—Gentlemen of the jury, have you arrived
506 at your verdict? If so, let your foreman arise and answer.

"The Foreman (Mr. Goodell).—We have not. You ask if we had come to a verdict?

"The Clerk.—Yes; have you arrived at a verdict?

"The Foreman.—We have not; no, sir.

"The Court.—Gentlemen of the jury: You have been out now somewhere about the space of three hours. The court very plainly gave you his instructions, and told you what it was your duty to do. The court instructed you that it was your duty to render a verdict of guilty in this case. There was nothing else for you to do; there is nothing else for you to do; and any individual juror or jurors who sets himself up against the plain instruction of the court is violating the oath which he took when he was sworn upon the case. The responsibility, gentlemen, of finding this verdict, is not yours; you simply have to do as the court directs you to do; and, as I said, no individual juror or jurors must set up his own opinion against the instructions given you by the court; that, under the law and the undisputed facts in this case, it is your duty to render a verdict of guilty in this case."

The jury again retired, and, after being out twenty minutes, returned into court, when the following took place:

"The Court.—Mr. Clerk, you may take the verdict.

"The Clerk.—Gentlemen of the jury, have you agreed upon your verdict? If so, let your foreman arise and answer.

"The Foreman.—We have.

"The Clerk.—What say you, Mr. Foreman? Do you find the respondent guilty or not guilty?

"The Foreman.—We find the respondent guilty, according to his honor's instructions.

"Mr. Dunham.—I would like to have the jury polled."

The jury was polled. Four of the jurors replied in substance that, because of the instruction of the judge, they voted guilty. Afterward a motion was made for a new trial, and an affidavit signed by eleven of the jurors was filed, stating in substance that each of them would have voted "not guilty," had they not believed that in so doing they would have been guilty of contempt of court, and possibly subject to fine and imprisonment.

507 Leaving out the question of whether this affidavit can be considered or not, it is very clear that up to the last moment the jury did not acquiesce in the direction of the court to find a verdict, and that four of them at least were unwilling to ac-

quiesce in said verdict. The practical effect of what was done was that not only did the trial judge direct the jury as to their duty, but when the jury failed to follow his direction, he did for them what he claimed it was their duty to do. Many questions are involved in the case, but the important question is, Can a trial court compel a verdict of guilty in a felony case, when some of the jurors are not willing to render such a verdict? The claim of counsel for the people is stated as follows: "The trial judge has power to direct a verdict of guilty in a criminal case where the facts are admitted or undisputed, and the intent is a legal inference from the undisputed facts, or in cases where the statute does not make intent an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without any culpability, and where consequently the bare commission or omission of the act in question in itself constituted the offense, irrespective of any felonious intent on the part of the defendant. . . . We contend that directing a verdict in a civil case or a criminal case comes to the court by virtue of its being the sole judge of the law; that, where the facts are undisputed, there is nothing for the jury to pass upon, and it logically follows that if the court is the judge of the law, and the facts are undisputed, it is then a question for the court to answer which party should recover in a civil case, and what the verdict should be in a criminal case": Citing *Montee v. Commonwealth*, 3 J. J. Marsh. 132; *Duffy v. People*, 26 N. Y. 588; *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. Rep. 273; *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775, 25 Atl. 964; *Hamilton v. People*, 29 Mich. 173; *People v. Mortimer*, 48 Mich. 37, 11 N. W. 776; *People v. Richmond*, 59 Mich. 570, 26 N. W. 770; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Repke*, 103 Mich. 459, 61 N. W. 861; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, and other cases.

⁵⁰⁸ It, of course, is well settled that in civil cases, where the facts are undisputed and the case turns upon a question of law, the court can direct a verdict, and he can have the clerk take the verdict without having the jury retire for consultation. It is not true, however, that this has ever been allowed in a criminal case in this state. Our attention has been called to a good many cases where the court has directed a verdict in a criminal case, but it has not been called to any case where the jury failed to follow the instructions of the judge, and the

judge himself pronounced the verdict. In a civil case the court may set aside a verdict, whether it be for the plaintiff or defendant. It may do the same thing in a criminal case in case of a conviction, but it cannot do so in case of an acquittal. It would be a useless form to take the verdict of a jury in a civil case involving only questions of law, where the verdict, whether for the plaintiff or defendant, might be set aside by the judge because contrary to the law; but the judge could not set aside a verdict of acquittal if rendered by a jury in a criminal case. Can he, by compelling a verdict of guilty, do indirectly what he could not do directly?

The right of trial by jury was denied to persons accused of crime in the early history of the race. It was not until after a long and persistent struggle that the right was secured. This right was deemed so essential that in the constitution of the United States, by the sixth amendment, "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed" is guaranteed. It has been held that this is a right which cannot be waived, and that a trial by the judge, even by the consent of the prisoner, is erroneous: *State v. Maine*, 27 Conn. 281. Article 6, section 28, of the constitution of this state also guarantees to the accused the right to a speedy and public trial by jury. This is a right which cannot be waived except by a plea of guilty: *Hill v. People*, 16 Mich. 351; *People v. Luby*, 56 Mich. 551, 23 N. W. 218; *People v. Murray*, 89 Mich. 284, 500 28 Am. St. Rep. 294, 50 N. W. 995. In *People v. Marion*, 29 Mich. 31, it is said: "It is one of the most essential features of the right of trial by jury at common law that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit." This case is cited with approval in *People v. Harding*, 53 Mich. 56, 51 Am. Rep. 95, 18 N. W. 555.

I think it clear that a general verdict involves not only a decision of the facts in the case, but an application of the law to the facts. In *Hamilton v. People*, 29 Mich. 189, this language is used:

"The circuit court was asked, but refused, to give the following instruction: 'This is a criminal trial on an information for felony, and all the questions of law and fact in the case are exclusively for the jury, and the jury are paramount judges both of the law and the facts.'

"The court held they were judges of law and fact under some restrictions and conditions, but not in the absolute way indicated.

"The precise definition of the rights of a jury in criminal cases is easier understood than expressed. Their decision upon the guilt or innocence of a prisoner can never be directly reviewed, and upon an acquittal there can be no new trial. But, if they have the legal authority claimed in the request, their verdict of guilty would be of the same force as their acquittal. In this country, for a long time past, exceptions have been usually allowed to the rulings of the court on the trial, and if those rulings are erroneous, the conviction will be set aside. But this can only be upon the idea that the jury are expected to follow the charges given; and it is as contrary to the law, as usually administered, to refuse to give a proper charge as to give an improper one. And if a judge were to decline to give any charge—as he might, if it is of no importance—it has been assumed that he would violate his duty.

"The law does not favor unnecessary intrusions by one functionary upon ground of others. But the charge of a ⁵¹⁰ judge in criminal cases is one of the ancient and traditional incidents of a trial, which must have been introduced for some purpose, and must have some value. It is certain that there is a great body of authority holding it to be meant for the guidance and instruction of the jury, and entitled to their respect. It is true that juries in criminal cases cannot properly find a conviction against their consciences. It is also true that they cannot be questioned or held responsible upon their verdict, nor called on to explain its reasons. Whether those reasons are based on a doubt or disbelief of evidence, or on a rejection of the exposition of law given by the court, they are equally beyond review. At common law a conviction was as final as an acquittal, and could only be relieved by a pardon. And it is very well understood that this immunity from censure or review is necessary to liberty. A jury cannot be compelled, in dealing with crimes, to separate the facts from the law. The right to give a general verdict is essential to the integrity of the system, and all attempts to deprive juries in criminal cases of that power have been opposed as destructive of the system. And experience has shown that special verdicts in such cases have not been favorable to justice. We need not hesitate to determine that it is within the power of juries to act upon their own view of the law. But it does not follow

from this that the law does not assume that they will respect the instructions of the court.

"The power of juries in criminal and civil cases is the same in kind, though different in degree. The practice of disregarding or relieving against wrong verdicts in civil cases is one largely of modern growth. In early times verdicts were substantially conclusive. In modern times, though they may be set aside, they cannot be reviewed or altered. And setting aside verdicts as against law is a matter of discretion, and not of right. An appellate court can only review the action of the judge, not that of the jury. And this, too, is not by virtue of the old law but by force of statutes, which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important, where guilt ⁵¹¹ depends on a wrong intent, to give full weight to every circumstance that can possibly affect it; and professional persons are under a constant temptation to make the law symmetrical by disregarding small things. But it is necessary for public and private safety that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of courts.

"It may be fairly regarded as one of the best features of the jury system that the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity and usually including in their number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way over nicety and technicality become less dangerous, if not absolutely harmless; and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

"But if the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible. All the mischief of

ex post facto laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere discretion of anyone. We must construe the jury system, like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of our common law, and it has been fixed by our constitutions as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law. And, looking ⁵¹² to that, we find that the judge has always assumed to give the jury instructions upon the law. We find, further, that while there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reserved cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any grounds of complaint, it would not be for wrong instructions, but for giving any charge at all. There is much difficulty in dealing with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a puppet is not the jury system which we have inherited.

"It would not be profitable to collate or discuss the authorities at length. They differ in terms more than in substantial results. If the charge is proper, it can only be so because it is to be respected. If juries disregard it, they may be free from personal risk, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The same thing cannot be lawful and unlawful when done by different persons.

"We understand the uniform practice and the decided weight of opinion to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted

to their review. And while we recognize the power of the jury to give wrong verdicts or to disregard the law, we are nevertheless warranted by usage and authority in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just."

In the discussion of the respective duties of the judge and jury, the eminent jurist, Justice Cooley, says, at page 392 of Cooley's Constitutional Limitations, sixth edition: "And the jurors must be left free to act in accordance with the dictates of their judgment. The final decision upon the facts is to rest with them, and interference by the court, with a view to coerce them into a verdict against their convictions, is unwarrantable and irregular. ⁵¹³ A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced. Still less would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been. He discharges his duty of giving instructions to the jury when he informs them what, in his view, the law is which is applicable to the case before them, and what is essential to constitute the offense charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged.

"How far the jury are to judge of the law as well as of the facts is a question a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict. They have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt. Where a general verdict is thus given, the jury necessarily determine in their own mind what the law of the case is, and if their determination is favorable to the prisoner, no mode is known to the law in which it can be reviewed or reversed. A writ of error does not lie on behalf of the commonwealth to reverse an acquittal, unless expressly given by statute, nor can a new trial be granted in such a case; but neither a writ of error

nor a motion for a new trial could remedy an erroneous acquittal by the jury, because, as they do not give reasons for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was not sufficient in degree or satisfactory in character, and no one is at liberty to allege or assume that they have disregarded the law.

"Nevertheless, as it is the duty of the court to charge the jury upon the law applicable to the case, it is still an important question whether it is the duty of the jury to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty either to follow ⁵¹⁴ it if it accords with their own convictions or to disregard it if it does not. In one class of cases (that is to say, in criminal prosecutions for libels) it is now very generally provided by the state constitutions or by statute that the jury shall determine the law and the facts. How great a change is made in the common law by these provisions it is difficult to say, because the rule of the common law was not very clear upon the authorities; but for that very reason, and because the law of libel was sometimes administered with great harshness, it was certainly proper and highly desirable that a definite and liberal rule should be thus established. In all other cases the jury have the clear legal right to return a simple verdict of guilty or not guilty, and in so doing they necessarily decide such questions of law as well as of fact as are involved in the general question of guilt. If their view conduce to an acquittal, their verdict to that effect can neither be reviewed nor set aside. In such a case, therefore, it appears that they pass upon the law as well as the facts, and that their finding is conclusive. If, on the other hand, their view leads them to a verdict of guilty, and it is the opinion of the court that such verdict is against law, the verdict will be set aside and a new trial granted. In such a case, although they have judged of the law, the court sets aside their conclusion as improper and unwarranted. But it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases comes from the merciful maxim of the common law which will not suffer an accused party to be twice put in jeopardy for the same cause, however erroneous may have been the first acquittal. In theory, therefore, the rule of law would seem to be that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear

weight of authority. There are, however, opposing decisions, and it is evident that the judicial prerogative to direct conclusively upon the law cannot be carried very far or insisted upon with much pertinacity, when the jury have such complete power to disregard it, without the action degenerating into something like mere scolding. Upon this subject the following remarks of Mr. Justice Baldwin, of the supreme court of the United States, to a jury assisting him in the trial of a criminal charge, seem peculiarly dignified and appropriate and at the same time to embrace about all that can properly be said to a jury on this subject: ⁵¹⁵ 'In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defense. You may find a general verdict of guilty or not guilty, as you think proper, or may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it is not applicable, or do not choose to apply it to the case. But if a jury find a prisoner guilty, against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act and cannot judge, there remaining nothing to act upon. This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule': *United States v. Wilson*, Baldw. 108, Fed. Cas. No. 16,730."

In *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. Rep. 273, there is an exhaustive collation of the authorities bearing upon this question. The court was divided upon the right of the judge to instruct the jury upon the legal presumptions arising from a given state of facts. Some of the judges were of the opinion that the jury was the judge of the law as well as the

facts. In the majority opinion, which is in accord with the views of Justice Campbell and Justice Cooley which we have already quoted, the court is careful to indicate that, while the judge may instruct the jury as to the law of the case which governs it, he may not compel a verdict. The language is as follows: "We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court in a criminal case ⁵¹⁶ to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary (Mr. Justice Miller concurring) in *United States v. Taylor*, 3 McCrary, 500, 505, 11 Fed. 470. It was there said: 'In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and, therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly.'

"We are of opinion that the court below did not err in saying to the jury that they could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged; that if the defendants were not guilty of the offense charged, the duty of the jury was to return a verdict of not guilty. No instruction was given that questioned the right of the jury to determine whether the witnesses were to be believed or not, nor whether the defendants were guilty or not guilty of the offense charged. On the contrary, the court was careful to say that the jury were the exclusive judges of the facts, and that they were to determine—applying to the facts the principles of law announced by the court—whether the evidence established

the guilt or innocence of the defendants of the charge set out in the indictment.

"The trial was thus conducted upon the theory that it was the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights."

⁵¹⁷ In *People v. Mortimer*, 48 Mich. 37, 11 N. W. 776, it is said: "In this state, in criminal as well as in civil cases, it is the duty of the court to instruct the jury upon the law, and it is the duty of the jury to accept the ruling: *Hamilton v. People*, 29 Mich. 173. It is, no doubt, in their power to disregard evidence, and to acquit persons whom they know to be guilty."

In *People v. Richmond*, 59 Mich. 570, 26 N. W. 770, the trial judge made a ruling, when the counsel for defendant said: "Of course, that ends the case." The court then directed a verdict of guilty, and the jury returned such a verdict. In disposing of the case the court said: "As defendant himself had sworn to his own guilt, and counsel had made the remark referred to, the court was right in so holding. Where all the facts are admitted, there is nothing for the jury to pass upon."

In the case of *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157, the facts were agreed to and were admitted. The court directed a verdict, but the verdict was rendered by the jury.

In the case of *People v. Neumann*, 85 Mich. 98, 48 N. W. 290, the following language is used: "Whenever there is no question of intent in a criminal case, and no inferences, about which reasonable men might differ, to be drawn from the facts, and where, upon the admitted facts, the only question to be determined is whether, under the law, the statute has been violated, the trial judge may, with perfect propriety, state to the jury that the law applied to the facts, which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty so to find under the facts and the law. But it has been repeatedly held that he cannot, in so many words, direct them that they must bring in a verdict of guilty; and that they are at liberty to find otherwise, if they see fit, under the federal constitution, which guarantees to every accused person 'the right to a speedy and public trial by an im-

partial jury of the state and district wherein the crime shall have been committed.' And verdicts have often been set aside when directed by courts in opposition to this right: See *United States v. Taylor*, 3 McCrary, 500, 11 Fed. 470, and cases there cited. But in this state, where a judge has directed ⁵¹⁸ a verdict of guilty, and the jury have followed such direction, and the facts are admitted or undisputed, and the only question is one of law, applied to such facts, a new trial will not be granted, if the judge was right in his application of the law. No injustice can be done the accused in such case, as it is not to be presumed that a jury will find in opposition to the law from mere whim, caprice, or prejudice, although they may have the right to do so. In this ruling we do not intend to encourage the practice of directing a verdict against the accused in criminal cases. In all such cases the jury should be permitted to retire to the juryroom, and there deliberate, and the trial judge should content himself by stating the law as applied to the facts, and with an admonition to the jury of their plain duty in the premises."

In *People v. Collison*, 85 Mich. 105, 48 N. W. 292, the facts were admitted. The judge directed a verdict, and, without sending the jury out, directed the clerk to enter the verdict. The court set the verdict aside, using this language: "We think, however, that the court erred in discharging the jury and directing a verdict of guilty to be entered by the clerk. In no sense can this be said to have been a trial by a jury. The verdict of the jury is absolutely wanting. If the defendant in a criminal case cannot waive a trial by jury, it is difficult to see how this conviction can be sustained. In the case of *People v. Neumann*, 85 Mich. 98, 48 N. W. 290, and in the several cases therein referred to in support of the conclusion arrived at there, the jury acquiesced in the direction of the court; but here the court gave the jury no opportunity to follow or to refuse to follow the court's direction; in fact, there was no direction to the jury, but one to the clerk to enter a verdict."

In *People v. Repke*, 103 Mich. 459, 61 N. W. 861, it is held that, in criminal as well as civil cases, it is the duty of the judge to instruct the jury as to the law of the case, citing *Hamilton v. People*, 29 Mich. 172, and *People v. Mortimer*, 48 Mich. 37, 11 N. W. 776, the judge adding: "But, as was said in the last case, 'It is no doubt, in their power to disregard evidence and to acquit persons whom they know to be guilty.' The court in the present ⁵¹⁹ case did recognize this power and expressly told

the jury that they could acquit, but if they found the respondent guilty at all, it must be for murder in the first degree." The question was submitted to the jury, and the verdict was returned by them.

In *People v. Hawkins*, 106 Mich. 488, 64 N. W. 736, is a statement of what was done, in the following language: "It is not claimed that the evidence stated by the court is disputed, and the point of this request appears to be that the jury should not have been told the court's opinion about it. He prefaced what he said about the evidence by leaving the question to them, and followed it by sending them to their room to determine the question of guilt or innocence. It is settled by former adjudications that it is the duty of the jury to take the law from the court, and that where there is no conflict in the evidence, and the defendant in open court admits facts legally constituting an offense, the court may so state, and even go so far as to direct a verdict. In this case the defendant had practically sworn to his own guilt, yet, in the abundance of his caution, the court left the question of intent to the jury: *People v. Richmond*, 59 Mich. 570, 26 N. W. 770; *People v. Ackerman*, 80 Mich. 588, 45 N. W. 367."

Our attention has not been called to a case in which the judge undertook to enter a verdict for the jury when the latter failed to follow the instructions of the court, and it is not believed such a case can be found. The cases of *People v. Neumann*, 85 Mich. 98, 48 Mich. 290, and *People v. Collison*, 85 Mich. 105, 48 N. W. 292, indicate very clearly that, should a judge attempt to return a verdict for the jury, he would be trespassing upon the province of the jury. In all the cases where a verdict was directed, the only question involved was a question of law. As a rule, the facts were admitted, so that it was simply a question of whether the admitted facts under the law showed respondent was guilty of the crime. Here the facts were not admitted. It became the duty of the people to show by competent evidence the guilt of the accused. It was for the court to say what evidence was competent, and to decide whether it should be admitted or not; but, after it was admitted, it was for ⁵²⁰ the jury to say what weight should attach to it. The jury were not obliged to believe a witness simply because he had been sworn. Can it be said that in this case the action of the jury cannot be accounted for upon the theory that they did not believe some of the witnesses? Whether that can be said or not, the fact remains that, under

the constitutions of the United States and this state, before a respondent can be convicted of a felony upon a plea of not guilty, a verdict of guilty must be rendered against him by the jury. While it is the duty of the jury to take the law from the judge, and be guided by it, still, if the jury does not do its duty, its failure to do so does not confer upon the judge added power, and authorize him to usurp the functions of the jury, and return a verdict of guilty himself. The right of the trial judge to direct the jury in relation to the law of the case is not conceded in all of the courts, but, as we have already seen, that question is no longer an open one in this state. When, in addition to that right, it was held that, in cases where the facts were admitted, the trial court might direct the jury to return a verdict of guilty, the border line separating the functions of the trial judge from the province of the jury was reached. If another step is to be taken, and, in addition to the right to direct a verdict, it is held the judge may, when the jury is unwilling to follow the direction of the court, compel a verdict, then the border line is passed, the judge has entered upon the province of the jury, the constitutional guaranty of a right of trial by jury in criminal cases is overthrown, and the judge has drawn to himself power which has not been exercised by any trial judge since the days of Magna Charta.

The statute under which this information is filed reads as follows: "The People of the State of Michigan Enact: That if any person holding any public office in this state, or if the agent or servant of such person, knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in ⁵²¹ his official capacity or employment, of the value of fifty dollars or upward, the person so offending shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state prison, at hard labor, not to exceed ten years, or by fine not exceeding five thousand dollars, or both said fine and imprisonment": 3 Howell's Stats., sec. 9263a.

It is the claim of the attorneys for respondent in relation to this statute that before one can come within its provisions, so as to make himself a felon, he must knowingly and unlawfully appropriate the money to his own use, or to the use of some other person, with an intent to so appropriate it as to forever exclude the rightful owner from its use and possession. We do not think the statute is susceptible of such construction. Section 9263c provides that the failure or refusal of any public

officer to pay over and deliver to his successor all moneys and property which should be in his hands as such officer shall be prima facie evidence of the offense. It is true that in *People v. Seeley*, 117 Mich. 263, 75 N. W. 609, it was said that a prima facie case may be rebutted, as in that case, by showing the money which should be in respondent's hands never came to him. I suppose, too, that if the accused was prevented from paying over the money by its being burned or stolen when in a proper place of deposit, that would rebut the implication that he had knowingly and unlawfully appropriated it to his own use. Other things might arise which would excuse him. It cannot be said of most men that, when they use public funds, they mean to permanently retain them. Experience shows that frequently they are lost because used for speculative purposes, the user expecting to return them, but failing to do so because his speculation did not turn out as he expected. The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permits others to do so, for other purposes than the one for ⁵²² which it was intrusted to him, then he comes within the provisions of the statute.

It is necessary to refer to but one other assignment of error. Mr. Lemon, who was one of the bondsmen of respondent, had testified to admissions made to him by respondent, and to payments made by his fellow bondsmen and himself. Upon cross-examination it was attempted to show all the conversation he had upon that occasion with the respondent, and the entire transaction about the payment. This was excluded. We think it proper cross-examination, and that it should have been admitted.

For the errors mentioned the conviction is reversed and a new trial ordered.

The other justices concurred.

TO AUTHORIZE THE CONVICTION OF A PUBLIC OFFICER FOR EMBEZZLEMENT, it must be shown that the accused is a public officer, or occupies a fiduciary relation; that the money or property which he is charged with appropriating to his own use came into his possession by virtue of his office or employment; and that he embezzled or fraudulently converted it to his own use. The guilty intent must be shown: *Robinson v. State*, 109 Ga. 564, 77 Am. St. Rep. 392, 35 S. E. 57; but the defendant may introduce evi-

dence relieving his failure or refusal to pay over money of its felonious intent: Note to *Calkins v. State*, 98 Am. Dec. 169.

WITNESSES.—IF PART ONLY OF A CONVERSATION, TRANSACTION, OR DOCUMENT has been introduced in evidence by one side, the other side may inquire into the whole of it: *Stockman v. State*, 24 Tex. App. 387, 5 Am. St. Rep. 894, 6 S. W. 298; and see *Stumore v. Shaw*, 68 Md. 11, 6 Am. St. Rep. 412, 11 Atl. 360.

FULLER v. LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION.

[122 Mich. 548, 81 N. W. 326.]

INSURANCE—ACCIDENTS—AMPUTATION OF “LIMB”—MEANING OF.—If a member of a mutual benefit association is insured against an injury which alone shall cause the “amputation of a limb [whole hand or foot],” the injury insured against is not the amputation or “loss” of a hand or foot, but the amputation of a “limb,” not necessarily a whole arm or leg, but any amputation of a limb which shall include a whole hand or a whole foot.

INSURANCE—ACCIDENTS—AMPUTATION OF PART ONLY OF A FOOT—NO RECOVERY.—A member of a mutual benefit association, insured therein against an injury which shall cause the “amputation of a limb [whole hand or foot],” cannot recover where a part only of a foot is amputated.

Assumpsit on a policy of insurance. The court directed a verdict for the defendant and the plaintiff brought error from the judgment entered thereon.

John B. McIlwain, for the appellant.

Phillips & Jenks, for the appellee.

548 HOOKER, J. The plaintiff was a member of a mutual benefit association, and held a certificate which he claims to entitle him to payment of three thousand dollars under article 19 of the by-laws, which is as follows: “Any member while engaged in any lawful avocation, receiving bodily injuries which alone shall cause amputation of a limb [whole hand or foot], or total and permanent loss of eyesight, he shall receive the full amount of his policy.”

The defendant refuses payment upon the ground that the injury sustained does not bring him within the by-law, for the reason that the injury did not cause amputation of ⁵⁴⁹ a whole hand or foot. The circuit judge directed a verdict for the defendant, and the plaintiff has appealed.

The record contains diagrams showing the size and shape of the whole left foot and the maimed right foot. They were made by drawing a pencil around them while the plaintiff stood upon a piece of paper. The length of the whole foot is eleven and five-sixteenths inches to the end of the great toe, while the amputated foot is exactly seven and one-half inches on a line drawn through the center of the foot, and seven and three-quarters inches if drawn in the direction of the great toe. It is thus demonstrated that the foot is shortened three and thirteen-sixteenths inches, which is as nearly one-third as it well could be. This one-third is from the toe, and it leaves two-thirds of the foot. This would leave all of the heel, and substantially all of the hollow of the foot, and possibly a part of what is called the "ball" of the foot. We do not overlook the statement that the skin of the sole was left longer to lap upward over the end, and perhaps part of the top, of the mutilated foot, but this cannot have lengthened it materially. It is claimed that it would be one inch. Counsel claims that the proof shows that all use of the foot is lost, and insists that this brings him within the spirit and meaning of the contract. He contends: 1. That the contract should be read as though it said, "Foot or whole hand"—in other words, that the qualifying adjective "whole" should not be applied to "foot"; and 2. That, in any event, the whole foot was amputated when it was so far removed as to be useless in the performance of the natural functions of a foot.

The natural construction of the words would be the same as though the by-law had said, "Whole hand or whole foot." Furthermore, the injury insured against is not the amputation of a hand or foot, but a limb; and the words in brackets, "Whole hand or foot," are used as explanatory of what was meant by the word "limb," i. e., an amputation, not necessarily a whole arm or leg, at the elbow or knee, but any amputation of a limb that should include a whole hand or a whole foot.

⁵⁵⁰ We are cited upon the second proposition to some authorities which are said to hold that, if the beneficial use of a member is lost, there may be a recovery. That would be a reasonable construction of a contract of insurance that should insure against the "loss of a hand or foot," for it might well be said that a foot or hand is lost when it is so impaired as to be of no further use; and that is as far as the authorities have gone. What is meant by the loss of a hand? Ordinarily, the term "loss" is obvious, but when it is considered in the light

of surrounding circumstances, viz., an insurance policy that indemnifies against the loss of a hand or an entire hand, it is not unreasonable to hold that the parties understood that any injury to the hand which rendered it useless was a loss of the hand or entire hand. In *Sheanon v. Pacific etc. Ins. Co.*, 77 Wis. 618, 20 Am. St. Rep. 151, 46 N. W. 799, where "an insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot,' the insured was accidentally shot in the back, the bullet penetrating his spine, and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. Held, that he had suffered 'the loss of two entire feet,' within the meaning of the policy."

The court said: "The question is, Does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot.' This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury ⁵⁵¹ must have destroyed the entire use of his legs and feet, so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds, the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving

about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy."

The next case in chronological order to which our attention is called is *Stevens v. People's etc. Ins. Assn.*, 150 Pa. St. 132, 24 Atl. 662. There it was held that: "An accident policy insuring against involuntary, external, violent, and accidental injuries and not against disease of any kind, or against disabilities which are the result, wholly or in part, of disease or bodily infirmities, and providing for a stipulated indemnity for partial permanent disablement, which is defined to be the loss of one hand or foot or both eyes, does not cover the case of indemnity for an injury where the foot is not lost or injured, and it may be used constantly by means of an appliance of a plaster jacket to the spine, although the foot could not be used if the appliance were removed." It was held that he had lost neither the foot nor the use of it.

The case of *Sneck v. Travelers' Ins. Co.* is next in order of 552 time. This case was tried twice, and is reported in 81 Hun, 331, 30 N. Y. Supp. 881, and 88 Hun, 94, 34 N. Y. Supp. 545. The undertaking in that case was based upon "a loss by severance of one entire hand or foot." At the first review the court held that it was error to submit the case to the jury where the proof showed that the hand was removed a short distance back of the knuckle. Bradley, J., dissented, urging that the policy insured against loss of the hand, and that, it being shown that the entire use of the hand was lost, there might be a recovery. Upon the second hearing this view was taken, Werner and Ward, JJ., sustaining it, Lewis, J., dissenting, and Bradley, J., not voting; and this order was afterward affirmed by the court of appeals in 156 N. Y. 669, 50 N. E. 1122.

Again, in *Lord v. American Mut. Acc. Assn.*, 89 Wis. 19, 46 Am. St. Rep. 815, 61 N. W. 293, it was held that "it is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand, is a loss of the hand, 'causing immediate, continuous, and total disability,' within the meaning of that clause in a policy of accident insurance."

A number of cases are collected in a note to *Turner v. Fidelity etc. Co.*, 38 L. R. Ann. 535, 536, 112 Mich. 425, 67 Am. St. Rep. 428, 70 N. W. 898.

In 1 American and English Encyclopedia of Law, second edition, 301, this subject is summed up as follows: "It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts, it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. Many of the companies have altered their policies ⁵⁵³ so as to read, 'The loss of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner, rather than to the exact physical extent, of the injury."

These cases establish the proposition that where an insurance policy insures against the loss of a member, or the loss of an entire member, the word "loss" should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word "loss" is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, "Loss by severance of feet or hands," have failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word "loss" is eliminated, and the insurance is against "an injury that shall cause the amputation of a limb [whole hand or foot], or total and permanent loss of eyesight." This language is not ambiguous, and if the insurance company intended to limit its liability to cases where the entire member was actually amputated, it could not well have chosen more apt and certain language to indicate it, without supplementing it with a negative statement that should exclude recovery for the amputation of less than the entire foot or hand; and it is doubtful if that

- would not be open to the same construction as the language actually used. This company is composed of the insured. They make contracts of insurance which protect against certain injuries merely. It is not for us to make contracts for them, nor should we enlarge their liabilities. We may determine the intention of the contracting parties as disclosed by the contract, if it is ambiguous, or in the light of the circumstances under which it was made, if it is fairly susceptible of a different meaning from that naturally ⁵⁵⁴ implied by the unexplained use of the words. This is neither.

The instruction of the learned circuit judge was correct, and the judgment is affirmed.

The other justices concurred.

ACCIDENT INSURANCE AGAINST "LOSS" OF LIMBS.—The "loss" of limbs, within the meaning of a policy of insurance, means the loss of their use as members of the body, so that they will perform no function whatever. Severance from the body is not necessary: Note to Lord v. American etc. Assn., 46 Am. St. Rep. 817.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

SCHIERBAUM v. SCHEMME.

[157 Mo. 1, 57 S. W. 526.]

WILLS—PUBLICATION—ATTESTATION.—If a will is read over in the presence and hearing of the testator and the subscribing witnesses, and he says that "that is all right," and signs his name thereto, and such witnesses sign their names thereto as witnesses, this is equivalent to a formal publication and attestation of the will.

WILLS — MENTAL CAPACITY — EVIDENCE.— If the subscribing witnesses to a will testify that the testator was of sound mind at the time of its execution, the trial court should withdraw the issue of mental incapacity from the jury by a peremptory instruction, in the absence of substantial evidence to the contrary.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—If a will is shown to have been executed according to law by a person of sound mind, the burden of proving that it is the result of fraud and undue influence is upon the contestant who makes the charge, and the mere fact that it apparently unjustly discriminates against one of the testator's children, in favor of another, does not shift the burden of proof on that other to account therefor. A man has the right to will his property to whomsoever he chooses, and the beneficiary is not bound to account for his choice.

WILLS—UNDUE INFLUENCE—EVIDENCE.—Undue influence in the execution of a will cannot be presumed from a mere coincidence of opportunity to influence, but affirmative proof of such undue influence is required to be made, either by direct facts shown, or of facts or circumstances, from which undue influence results as a reasonable and fair inference, and not as a mere conjecture.

WILLS—UNDUE INFLUENCE.—DECLARATIONS OF THE TESTATOR after making the will as to the causes which induced him to make it are incompetent, and should be rejected as hearsay on the issue of fraud or undue influence in the execution of the will.

WILLS—EVIDENCE.—ADMISSIONS OF DEVISEE are not admissible in evidence against another devisee claiming under the same will.

EVIDENCE—OBJECTIONS TO.—If a party has seasonably objected to evidence of a certain character by one witness, and his objection has been overruled, he is not required to repeat his objection when testimony of the same kind is offered by another witness.

Norton, Avery & Young and J. W. Powell, for the appellants.

D. P. Dyer, Martin & Woodfolk, and G. T. Dunn, for the respondents.

VALLIANT, J. This is a contest of the will of Henry Schemme, deceased; which was probated in the probate court of Lincoln county in 1895. The plaintiffs are one of the daughters of the testator and her husband. Defendants are a son and another daughter of testator and the executors of the will.

The petition attacks the will on three grounds: That it was not executed in accordance with the law; that at the time of its alleged execution the testator had not mental capacity to make a will; and that it was obtained by undue influence practiced by defendant George Schemme.

The statements constituting the charge of undue influence are to the effect that the testator was old and infirm, his mind impaired by age and disease and the excessive use of intoxicating liquor, and in condition to be easily influenced by those who for the time being had his confidence; that George Schemme, knowing his condition, did, just prior to the making of the will, for the purpose of influencing him to make it and to prejudice him against plaintiff Caroline, falsely and fraudulently induced him to believe that her husband ⁶ had stolen from him a dollar and certain notes, and under that belief the will was made. The answer was a general denial and averments to the effect that the paper was the testator's last will, etc.

The testator's wife had died some years previous to his death; his only children were the plaintiff Caroline Schierbaum, George Schemme, and Sophia Ortlep. The estate was worth fifteen thousand dollars to twenty thousand dollars, consisting principally of the home farm, worth from seven thousand dollars to eight thousand dollars, which he devised to George, and a mortgage for five thousand dollars on another farm which he bequeathed to Sophia; he willed five hundred dollars to

Caroline, and the balance to George and Sophia. There was evidence tending to show that he had previously given Caroline or her husband sums amounting to about seven thousand dollars. The trial resulted in a verdict that the paper was not the will of Henry Schemme, deceased, which the court on motion for a new trial refused to set aside, and judgment for the contestants followed, from which the proponents of the will prosecute this appeal.

1. The formal execution of the will was proven beyond question. The testimony of the two subscribing witnesses was to the effect that the testator was of sound mind; that the will was read to him twice—that is, it was read entirely once, and before signing it he asked that it be read again, which was done down to and including the clause containing the bequest to Sophia Ortlep, when he interrupted the reading, saying, "Stop, that will do; that is all right," and signed it. When it was signed the testator and the two witnesses were seated at the same table; he signed it first, and passed it to one of the subscribing witnesses who signed it, and passed it to the other who also signed it; then the testator handed it to Mr. Wise, one of the persons named as executors in the will and who had written it and asked him to seal it up. Mr. Wise put it in an envelope, sealed it, and handed it back to the testator, who then handed it to Mr. Hardesty, who was ⁷ also named as an executor therein, and asked him to put it in the bank for safe-keeping.

This testimony made a *prima facie* case for the proponents. It is suggested that it does not show that the witnesses subscribed it at the request of the testator. The whole conduct, however, was a sufficient request. The paper itself purported to be the will of Henry Schemme; it had been read in the presence and hearing of all, and when he said that it was right it was equivalent to a formal proclamation that it was his will, and when he signed it and passed it at the table to the witnesses who signed it in his presence his act constituted a request that they sign it; it could mean nothing else and was as significant to that effect as if it had been put in formal words. Besides, after the trial had progressed to another stage, further testimony developed that these two subscribing witnesses had been selected for that purpose by the testator and were present in compliance with a message sent them by him.

2. Nor was there any evidence to support the contention that Henry Schemme was of unsound mind when he made the

purported will. He was a German farmer and lived for a great many years on his home place, which was about half a mile from Winfield in Lincoln county. He was seventy-four years old at the time of his death, which occurred in August 1895, about a month after the execution of the paper in controversy. His wife died in 1885, and after that he became addicted to the intemperate use of whisky, which impaired his physical health, and, while he was under its immediate influence, rendered him mentally incapacitated for business. He had lived long in that community and was well known; his habits and conduct seem to have been subjects of general information among his acquaintances, but among the large number of witnesses called to testify none ^s gave any evidence that would justify the submission of the question of his sanity to the jury.

Counsel for respondent, in discussing this point in their brief, especially mention the testimony of Mrs. Browngardt, Mrs. Catherine Schemme, Dickmeyer and Dr. Hewitt as sustaining their views.

This is what Mrs. Browngardt said: "Q. You said this morning that when Mr. Schemme was drinking he was childish and cross? A. Yes, sir. Q. How was he when sober? A. Well, he would talk right sensible then. Q. Was his mind clear and sound when he was sober? A. Not very. Q. Could he transact business when sober? A. Yes, sir; he always attended to his own business. Q. When he was sober he was a fairly good business man? A. Yes, sir."

Mrs. Catherine Schemme said: "Q. How often would he be under the influence of liquor, how often drunk? A. Oh, I can't say that; he stayed all day in the house, you know. Q. Well, in his movements about could you tell whether he would stagger or not or whether he walked straight? A. Sometimes, you know, he lays down and sometimes he stays there. Q. How was he when you saw him there in July, 1895, when you went there and stayed that week; how was his condition then in his mind? A. He was a little weak." On cross-examination: "Q. As far as you know the old man always attended to his own business? A. Yes, sir; and his children helped to work for him, too. Q. But he attended to his own business, didn't he; rented out his farms and collected his rents, interest, etc.? A. Yes, sir."

Dickmeyer said: "Q. What was the condition of his mind up to the time he went down to George's? A. It wasn't very good. Q. What do you mean by not being very good? A.

Well, he was getting old and childish and drinking ⁹ too much liquor. Q. When he was not under the influence of liquor do you think he was capable of attending to his business? A. I guess he was, if he didn't have any at home, but he was hardly ever without it at home, unless he would send for a keg from St. Louis and it would not come in time then he was out. . . .

Q. He always knew what children he had up to the time he went down to George's? A. Lots of times he didn't know himself, he was so drunk; I have picked him up often off of the railroad track just before the Denver came along. Q. When he was not drunk do you think he had sense enough to know that he only had three children? A. I guess so. Q. Do you think he had sense enough to know who those children were? A. Yes, sir; if he was sober. Q. When he was sober do you think he had sense enough to know what property he owned? A. Yes, sir. Q. Now in fact he was a pretty good business man, wasn't he when he was sober? A. He was good enough to beat me out of twenty-five dollars for labor, that was for work years and years ago, about twenty-five years ago when I first came to this country."

Dr. Hewitt, who had been his physician for many years and attended him in his last illness, testified that his mind was as good as the average man's mind at his age; that he regarded him sound. This witness had not only been his physician, but had had business with him, in the organization of the bank at Winfield. On cross-examination he said that he had advised Schemme that if he did not quit drinking whisky it would kill him, and that he did not quit. And under further cross-examination he said: "Q. I will ask you the question whether or not Henry Schemme's mind as well as his body was impaired and weakened by the excessive use of intoxicating liquors. A. As his body weakened his mind necessarily weakened in proportion. That is the case with anybody no matter what they drink. Q. What was the condition of Henry Schemme's mind during the last six ¹⁰ months, especially about the time this will was made, as compared with the time before he was suffering with atonic dyspepsia? A. I don't know that I noticed any particular difference. Q. You think his mind about that time, the time he made this will, was as good as you had ever seen it? A. Of course, I don't know that I could say that it was just as good, his mind was not weakened to that extent you could notice it."

We have quoted from these four out of the large number of witnesses, because they are especially selected by counsel for

respondents in their argument in justification of the court's refusal to give the instruction asked by appellants to the effect that there was no evidence to show that the testator was of unsound mind. The counsel for respondent do not appear to have considered at the trial that there was any evidence sufficient to go to the jury on the point, for they asked no instruction on it, at least the record does not show any and none was given. But as that was one of the grounds of attack and testimony designed to sustain it was introduced, which, without instruction, the jury were liable to misapply, the appellants were entitled to the instruction they asked taking that issue from the jury. It was error to have refused that instruction: *Harvey v. Sullens*, 56 Mo. 372; *Young v. Ridenbaugh*, 67 Mo. 574; *Jackson v. Hardin*, 83 Mo. 175; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369.

3. The main forensic contest was upon the third ground of attack upon the will, to wit, the alleged undue influence exerted by George Schemme.

The testator had but three children—Caroline, the eldest, who married Herman Schierbaum in 1880, and went to Winfield to live with her husband; George and Sophia, who continued to live with their parents until 1885, when their mother died, and after her death until 1888, when they both married. Then Sophia and her husband went to live on the ¹¹ Wallenbrook farm; but George's wife and his father did not get along well together and they moved to the Wallenbrook farm, and Sophia and her husband moved to her father's farm; but after a year or so her husband and the old man had a falling out and they moved to St. Charles, and George and his wife came back to live with his father. But trouble came on again between George's wife and his father, and in 1892 they moved to Winfield. Then Caroline came and lived with him until in 1893, when he rented the farm to Browngardt, and then Caroline went back to Winfield, and the old man lived on the farm with the Browngardts until about a month before his death, when he moved to George's in Winfield, where he died. For some time before he moved to George's he had been going daily to Caroline's in Winfield and taking his dinner with her, and he was having a room added to Schierbaum's house with a view of moving there to live. The will in question was executed Tuesday, July 9, 1895. On the Saturday night before, Schierbaum had been at the farm to visit the old man and had re-

mained with him until 9 o'clock. George was also there that night and remained until the next morning, but did not sleep in his father's room.

The evidence showed that the testator held the promissory notes of Schierbaum for a considerable amount, given for money loaned or advanced him. It also showed that at the time this will was made the testator had missed those notes and a dollar from the drawer or box where he had kept them, and he suspected Schierbaum of having stolen them; he afterward found the missing dollar, but he died under the belief that the notes were gone. The whole force of the plaintiff's attack on this will is concentrated in their proposition that George took the notes, made his father believe that Schierbaum had taken them, and thereby so prejudiced him as to induce him to make the will cutting off Caroline with five hundred dollars. If the proposition were true in fact, the conclusion ¹² of law which the respondents would draw from it is correct; a writing obtained under those circumstances is in contemplation of law the result, not of the will of the maker, but of the fraud practiced upon him.

When a will is shown to have been executed according to the requirements of law by a man of sound mind, the burden of proving that it was the result of fraud or undue influence is upon the contestant who makes the charge. The mere fact that it apparently unjustly discriminates against one of the testator's children in favor of another does not shift the burden of proof on that other to account for the discrimination. A man has the right to will his property to whomsoever he chooses and the beneficiary in his will is not bound to account for the choice. To hold otherwise would seriously impair the right to dispose of property by will: *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506. There is no evidence in this case to show that the testator regarded one of his children with more affection than another, but there was evidence to show that he intimated that he had previously given Caroline or her husband as much as either of the other two would get by the will, and that he did not think Schierbaum (he seemed in speaking of it to have merged Caroline in her husband) was entitled to as much then as either of the other two. Long before this will was written he had expressed himself in this way, and had frequently said that he intended to leave the home place to George and the other place to Sophia. He had, in fact, made one or two other wills as far back as 1885 which were substantially like this one and then

said that Schierbaum had had enough. Those previous wills he afterward destroyed and was heard to say he would never make another, that the law makes the best will.

No attempt was made to account for the destruction of these previous wills. Whether it was during a period of hostility with George's wife or Sophia's husband or from any other cause is left to conjecture, but the fact is he ¹³ changed his mind, as he had a right to do, and that fact is all that we are concerned with. The next day after he went to George's, he, George, and Hardesty went back to the farm to look for the missing notes. On the way Hardesty explained to him that the loss of the notes would not prevent their collection. At the farm Hardesty and the old man searched for the notes, but could not find them. The will was made the next day and the testator died about three weeks thereafter. The day after the death of his father George went to the farm, and in company with Browngardt went into the room formerly occupied by his father and looked among his papers to get a paper relating to the family record for the preacher who was to preach the funeral sermon. This he got and went away; at that time he had the keys to the room and the drawers. After the will was probated the executors, Wise and Hardesty, in company with George, went to the farm to examine the papers. When they opened the box of papers the Schierbaum notes were there on top and the first papers seen. This was the same box that Hardesty and the old man had searched the Monday before the execution of the will. The inference which the plaintiff draws from these circumstances is that George took the notes the Saturday night he stayed at the farm and returned them when he came the day after his father's death to get the family record.

It appears from the evidence that on the Saturday night when Schierbaum was at the farm it was arranged between him and the old man that he was to go to St. Louis the next day to bring Mrs. Catherine Schemme to the farm to take care of the old man until the room at Schierbaum's would be finished for him, and that Schierbaum went to St. Louis accordingly and Mrs. Schemme came the following Wednesday.

George's testimony as to his visit to his father on that Saturday night was that early the next morning his father told him that he had missed the Schierbaum notes and a dollar, and that he suspected Schierbaum of having taken them; ¹⁴ that was the first information he had that his father held notes of Schierbaum's; he and his father then looked through some papers

but could not find the notes; before he left his father told him that he was sick and could not stay at the farm any longer, asked him to speak with his wife about it and take him to their home; George went home and returned to the farm about 10 or 11 o'clock that morning with his wife, who had a talk with his father and then they took him home; that he never suggested to his father that Schierbaum had taken the notes.

Fritz Meyer, a witness for defendants, testified on cross-examination that the old man had told him a month before he moved to George's that the Schierbaum notes were missing.

Evidence tending to prove the above-mentioned facts and circumstances is all the legitimate foundation there is in this record upon which to build the plaintiff's theory of fraud and undue influence.

There was other evidence which we will presently consider upon which they relied, but unless the above circumstances alone constitute a chain of evidence from which the jury might legitimately find that George abstracted the notes and imposed on his father the belief that Schierbaum had taken them, and that that fact was the cause of the will, the court should not have submitted that issue to the jury.

The most that can be said for this chain of circumstances, from respondents' point of view, is that George had an opportunity to do what they charge against him. But even the opportunity was not very clear. It is not shown that he handled his father's papers or that he had access to them. The single fact is that he spent the night there, sleeping in another room than his father's. To give effect to the respondents' theory we must assume that in the night when his father was asleep he entered the room—whether the door was locked or left unlocked we are not informed—found the keys ¹⁵ to the drawer containing the papers, overcame whatever other impediments he might have encountered, and carried the notes away. The fact that the notes were found in the box where search had before been made for them and that George had had the opportunity to put them there are circumstances upon which respondents lay great stress. Again, it must be noted that this opportunity was not clear, for one of plaintiff's witnesses, Brown-gardt, was with George when he went into the room and opened the drawer to search for the family record, assisted him in the search, and saw or had opportunity to see everything that he did, yet he saw nothing of the kind that is charged. And when we are asked to draw conclusions from opportunities, we should

not forget that this same witness for plaintiffs, and for whose testimony they ask great respect, said that on the Saturday night in question he saw Schierbaum sitting on the floor close to the bureau drawer handling papers; he and the old man were looking over them together. We mention this not to reflect upon Mr. Schierbaum, for in fact we do not think there is anything in the record to justify a belief that either he or George Schemme took the notes, but we mention it to illustrate how unreliable as a source of legal inference such an opportunity is, yet such is the strength of the respondents' case. In the so-called chain of circumstances there are too many missing links to render the deduction that the respondents seek to draw reasonably safe. The old man was just as sure that the dollar was gone as he was that the notes were gone, yet he afterward found the dollar just where he had put it and where he had previously looked for it in vain, and where the notes, after he and Hardesty had shuffled the papers in their search, were found by the executors. It is not more improbable that in the very search the old man, in his nervous condition, made for the supposed missing notes, they were turned up and left on top of the other papers in the box as they were found, than that George entered the room at ¹⁶ night and took them away and afterward returned them so skillfully that Browngardt, who was present, did not see him do it. The one theory rests as much on conjecture as the other and neither has sufficient foundation to support a verdict.

The burden was upon the contestants to establish the fraud or undue influence charged, and not only that, but their burden was to overcome that presumption which exists in favor of the will when its formal execution was shown and mental capacity of the testator established. In a recent case this court, per Robinson, J., said: "Undue influence cannot be presumed from a mere coincidence of opportunity to influence. . . . Affirmative proof of such undue influence is required to be made either by direct facts shown, or of facts and circumstances, from which undue influence results, as a reasonable and fair inference and not as a mere conjecture": *Doherty v. Gilmore*, 136 Mo. 419, 420, 37 S. W. 1127.

4. The next day after the will had been made the Schierbaums heard of it and heard that the old man suspected Schierbaum of having taken the notes and they went to him about it. Over the defendants' objection Mrs. Schierbaum was permitted to testify that her father then told her that George had

made him believe that Schierbaum had taken the notes, and that her father also said that he had mistreated her in the will but would change it before he died.

Testimony which purports to relate what a testator said, after making a will, in relation to the causes which influenced him to make it, is in the category of hearsay evidence and is incompetent. This principle was first announced by this court in an opinion by Leonard, J., in *Gibson v. Gibson*, 24 Mo. 227, and reiterated in several decisions since: *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

These rules of evidence are not established by mere arbitrary law, nor are they designed to restrict the legitimate ¹⁷ range of inquiry in the trials of disputed facts. But, on the contrary, they are made in the interest of justice, and experience demonstrates their wisdom. In a heated conflict where enmity often supplements interest, the aptitude to misunderstand and even the temptation to misrepresent is not infrequently apparent. Even when a rehearsal of a conversation is admissible in evidence the courts are fond of saying that little weight is given to what dead men are said to have said.

The learned counsel for respondents say that the objection to this evidence was not specific enough, and that since it was admissible to show the condition of the testator's mind and his regard for his daughter, it was not error to have admitted it. But we cannot mistake the purpose for which it was offered nor the prejudicial effect it was likely to have had. The whole context shows that it was offered to prove that George practiced that imposition on his father and it could have been weighed by the jury in no other light. He denied upon the stand that he had done so, but it was easy to argue that of course he would deny it. The court erred in admitting that evidence.

5. Mrs. Schierbaum was also permitted, over the objection of defendants, to testify to the effect that when she and her brother sat together by their father on his dying bed her brother told her that he had made their father believe that Schierbaum had taken the dollar and the notes, but that if Schierbaum would not make him trouble about it he would make it all right with the will.

In an early case this court in an opinion by Napton, J., held that in a will contest, a declaration of one devisee in the nature of an admission might be given in evidence not only as against

himself but also as against the other devisees: *Armstrong v. Farrar*, 8 Mo. 627.

The rule was there announced, however, with hesitation.¹⁸ The court said: "The rule, as we suppose, is founded: 1. Upon the reasonable presumption that no person will make any declaration against his interest, unless it be founded in truth; and, 2. Upon the fact that the person making the declaration against his interest, being a party to the suit, cannot be examined, and therefore does not conflict with the established maxim, that the best evidence which the nature of the case admits of must be produced." Then after some discussion of authorities on the subject the court adds: "Without feeling under the necessity in this case of determining which of these conflicting adjudications should be followed, we may safely adopt the rule that where both reasons concur, where the admission is against the interest of the person making it, and that person is a party to the record, it is evidence against the party making it, and his coparties, where there is a joint interest or privity of design between them." Some further discussion of authorities follows and the court again says: "It is clear that confessions or admissions of a party are only evidence against him when parol evidence of the same fact would be competent, or, in other words, when in the judgment of the law higher and better evidence in existence cannot be produced. . . . Hence where the party himself can be examined, his admissions are no evidence." That decision was rendered in 1844, when a party to the suit was incompetent as a witness.

In *Hurst v. Robinson*, 13 Mo. 82, 53 Am. Dec. 134, the same rule was announced and *Armstrong v. Farrar*, 8 Mo. 627, cited as authority for it, but the admission in that case was of one former partner concerning a partnership transaction and where there was a joint interest. In *Allen v. Allen*, 26 Mo. 327, it was held, citing *Armstrong v. Farrar*, 8 Mo. 627, that the admissions of an administrator, he being also a distributee of the estate, were competent as evidence in support of a claim presented for allowance against the estate.

¹⁹ In *Jackson v. Hardin*, 83 Mo. 186, it was said by Philips, C., *arguendo*: "The general rule is that the admissions or statements of one of the parties to the record in an action of this character [will contest] is admissible against all the defendants, because there is a joint interest in all." And *Armstrong v. Farrar*, 8 Mo. 627, is cited as authority for the proposition. But in *Jackson v. Hardin*, 83 Mo. 186, the court was dealing

with the converse of the proposition, and the only point decided in that connection was that the trial court did not err under the circumstances in sustaining objections to questions calling for such admissions. Those are all the cases in our reports that we have seen in which *Armstrong v. Farrar*, 8 Mo. 627, is relied on, and an examination of them shows that they do not involve the question we are now dealing with.

In *Von De Veld v. Judy*, 143 Mo. 368, 44 S. W. 1122, the question is incidentally considered and *Sherwood, J.*, for the court, said: "There are authorities in this state to the effect that such admissions are competent evidence. But, on the other hand, there is much authority to the contrary, and perhaps the great preponderance of authorities is opposed to the view asserted in the early case of *Armstrong v. Farrar*, 8 Mo. 627."

The law has been changed by the legislature since *Armstrong v. Farrar*, 8 Mo. 627, was decided by removing one of the reasons on which the decision was based, that is, that the party himself could not be called as a witness, for, as we have seen, it is the language of the decision itself that "where the party himself can be examined his admissions are no evidence."

The supreme court of Pennsylvania in an early contested will case said: "*Margaret King* was a principal devisee in the will, which gave her the whole estate (except a few legacies to a small amount) for her life; after her death one-half was to go to her relations, and one-half to the relatives of the testator. . . . Granting that she is so ²⁰ much a party to the suit that her confessions might be evidence against herself, these confessions are not the confessions of the others, who have a separate interest. It is not like the case of joint partners, where the confession of one may be used against both. We are now to establish a general principle to govern all cases of this kind. It happens that *Margaret King* has a large interest under this will. But if her declarations are evidence, so also must be the declarations of a legatee, who takes but five dollars, or any other sum. The quantum of interest will make no difference": *Tilghman, C. J.*, in *Nussear v. Arnold*, 13 Serg. & R. 328. And later that court, per *Woodward, J.*, said: "The general rule of law consonant with reason is, that one person is not to be prejudiced by the unauthorized declarations of another. The exceptions to this rule are found in those cases where there is a joint interest or privity of design between several. In such case each is presumed to speak for the whole; but where there

is neither joint interest nor combination, where each claims independently of the other, though under a common instrument, the words of one no more than his acts can bind the other. The interests of these devisees and legatees under the will are several and joint; and hence the three who impeach it were bound, on principle, to produce evidence that was competent against all the rest": *Clark v. Morrison*, 25 Pa. St. 456. See, also, *Titlow v. Titlow*, 54 Pa. St. 222, 93 Am. Dec. 691.

The supreme court of Massachusetts in such a case used this language: "Devisees or legatees have not that joint interest in the will which will make the admissions of one admissible against the other legatees. . . . Admitting for the present that any interest in a will obtained by undue influence cannot be held by third parties, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should ²¹ be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions": *Shailer v. Bumstead*, 99 Mass. 127, 128. Those decisions are found frequently quoted in the later decisions on the question. To the same effect are *Forney v. Ferrell*, 4 W. Va. 729; *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304; *Dan v. Brown*, 4 Cow. 492, 15 Am. Dec. 395; *In re Will of Baird*, 47 Hun, 77; *Thompson v. Thompson*, 13 Ohio St. 356; *Blakey v. Blakey*, 33 Ala. 616; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757; *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473; *Underhill on Evidence*, sec. 67; 9 Am. & Eng. Ency. of Law, 1st ed., 343.

Greenleaf lays down the general principle that where there is a joint interest, the admission of one may be given in evidence against all, and that principle all the authorities recognize: 1 Greenleaf on Evidence, 16th ed., secs. 171-174. And he says that it has been decided that the rule applies to devisees or legatees under the same will, and cites some early decisions to that effect. He does not say, however, that such is a correct application of the rule, but cites in the same note decisions to the contrary.

We are satisfied both on reason and authority that the rule laid down in the Pennsylvania and Massachusetts cases above quoted is right, and that that stated in *Armstrong v. Farrar*, 8 Mo. 627, whilst it is correct as applied to cases of joint interest, is no longer to be regarded as the correct rule applicable to

devises or legatees holding separate rights under a common will.

In the case at bar George Schemme was not the only party interested in upholding this will; his sister, Mrs. Ortlep, had a large separate interest of her own that he could not destroy by any admission or act of his.

It was error to have admitted the testimony of Mrs. ²² Schierbaum as to the alleged declaration of George at the bedside of his father.

The testimony of Eckelmier as to the similar conversation alleged to have been had by George with Schierbaum at his shop was incompetent for the same reason. Although the record does not show that there was any objection to Eckelmier's testimony, yet, as it came after the court's ruling on the same kind of testimony by Mrs. Schierbaum, it is covered by the objection. Where a party has seasonably objected to evidence of a certain character by one witness and his objection is overruled, he is not required or expected to repeat his objection when testimony of the same kind by another witness is offered; indeed, proper decorum would indicate that he should not do so. Eckelmier's testimony on this point should have been excluded.

Eliminating from the case what the testator after making the will is said to have said, and what George is said to have said, the respondents have nothing upon which to construct their theory of fraud and undue influence, except the facts that the old man missed the notes and George had the so-called opportunities of doing what he is accused of having done. No reasonable inference of fraud or undue influence can be drawn from those facts, and the court should have given the instruction asked by the defendants withdrawing that issue from the jury, and instead of the instructions given should have directed peremptorily a verdict for the proponents establishing the will.

The judgment of the circuit court is reversed and the cause remanded to that court, with directions to enter judgment that the paper writing propounded is the last will and testament of Henry Schemme, deceased.

All concur.

WILLS.—PUBLICATION of a will is not necessary unless made so by statute: *Scott v. Hawk*, 107 Iowa, 723, 70 Am. St. Rep. 228, 77 N. W. 487. It may be made in any form of communication by the testator to the witnesses whereby he makes known that he intends the instrument to take effect as a will: *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

WILLS.—UNDUE INFLUENCE as affecting the validity of wills is the subject of the monographic note to *In re Hess' Will*, 31 Am.

St. Rep. 670-691. Undue influence in the execution of a will is never presumed; the burden to show it is upon the contestant: *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, 44 S. W. 724. And the presumption in favor of the validity of a will is not overcome by the fact that it unjustly discriminates in favor of a son of the testator: *Berberet v. Berberet*, 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61.

WILLS—UNDUE INFLUENCE.—DECLARATIONS made by the testator, both before and after the execution of a will, as to his feeling toward the contestant, his reasons for not recognizing him in his will, the legatee's influence over him, and the disposition to be made of his property, are admissible to show undue influence: *Estate of Goldthorp*, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845.

WILLS—WITNESS.—ON THE TESTIMONY of subscribing witnesses to a will as to the mental competency of the testator, and the weight to be given such evidence, see the monographic note to *Stevens v. Leonard*, 77 Am. St. Rep. 478-480.

IN RE FLUKES.

[157 Mo. 125, 57 S. W. 545.]

CONSTITUTIONAL LAW—WAGES OF RESIDENTS—SUIT IN ANOTHER STATE.—A statute providing that any person who shall send out of the state any note, bond, account, or chose in action for the purpose of instituting suit thereon to subject to the payment thereof the wages of any resident of the state, shall be guilty of a misdemeanor, is void, as being repugnant to constitutional provisions prohibiting the state from depriving any person of property without due process of law, or from granting to any person any special or exclusive right, privilege, or immunity, or from denying to its citizens the equal protection of the laws, and providing that the citizens of each state shall be entitled to all of the privileges of citizens in the several states. Such statute is also unconstitutional in that it undertakes arbitrarily to separate natural classes of persons, and to provide different rules of action for each of the dissevered classes thus unwarrantably formed into a class of its own.

T. B. Harvey, for the petitioner.

P. W. Haberman, for the respondent.

126 SHERWOOD, J. This is an original proceeding instituted in this court, the object of which is to test the constitutionality of an act passed by the fortieth general assembly of this state, which act is the following:

"Every person or persons, company, corporation, or firm, and every agent of any person, persons, company, corporation or firm, who shall take or send, or cause to be taken or sent, out

of this state any note, bond, account, or chose in action for the purpose of instituting or causing to be instituted any suit thereon in a foreign jurisdiction against a resident of this state, for the purpose of having execution, attachment, garnishment, or other process issued in such suit, or upon a judgment rendered in any such suit, against the wages of a resident of this state, and having such process served upon any person who is, or firm, company, or corporation which is, subject to the processes of the courts of this state, who is indebted or may become indebted to a resident of this state for wages, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred ¹²⁷ dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days": Rev. Stats. 1899, sec. 2356.

If the act just quoted be unconstitutional, the petitioner's right to be discharged can no longer be questioned in this court, because we now treat (just as it ought always to have been treated) an unconstitutional law as no law at all: *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628, and cases cited.

When put in more condensed form, the section on which the prosecution of the petitioner is based gives forth these results: It subjects any person, etc., to a fine of not less than one hundred dollars nor more than five hundred dollars, and imprisonment in the county jail for not less than thirty nor more than ninety days, who sends out of this state, etc., any note, etc., account, etc., for the purpose of instituting any suit thereon in a foreign jurisdiction against a resident of this state for the purpose of having execution, attachment, garnishment, etc., issued in such suit, or upon a judgment rendered in such suit, against the wages of a resident of this state, and having such process served upon any corporation subject to the processes of the courts of this state, which is indebted to a resident of this state for wages.

Under the provisions of section 3435 of the Revised Statutes of 1899, no person can be "charged as garnishee on account of wages due from him to a defendant in his employ for the last thirty days' service; provided, such employé is the head of a family and a resident of this state."

It will thus be seen that under the laws of this state the wages of a single person, an employé and a resident of this state, are not exempt from the process of garnishment here, while under the terms of section 2356 such wages are expressly exempted from the process of garnishment in another state, unless the creditor

who attempts to garnish them over there is willing to incur the punishment of both fine and imprisonment for such a course.

This, in effect, gives to single ¹²⁸ and unmarried persons who are residents of and employés in this state an exemption in Illinois and other states they are not allowed in this, the state of their residence. This results in exempting all those single men residents, etc., whose wages are attempted to be seized under process of a foreign court, while it leaves unexempt those whose wages are garnished under process of our own courts.

Besides, those wage-earners resident of this state who are married can only claim in this state an exemption of wages due for the last thirty days' service, while they, and all single wage-earners by the law in question, so far as concerns suits in foreign jurisdictions, are exempt without any limit as to their exemption. The effects of the section are more widespread than already related, as will presently appear.

The creditor of any other than a wage-earner may freely send over to Illinois or elsewhere, without fear of arrest or of fine or imprisonment, "any note, bond, account, or chose in action," and institute such suit as he may please, and obtain any such process as he may desire, and levy and seize on any personal or real or mixed property or debts or wages, and may collect his claim in due and usual course of law, without let or hindrance. Why should such discrimination be made among creditors merely because the debtors in one case receive their remuneration for their labor in wages, and in the other in cash payments day by day, or in a cow, horse, produce, or a tract of land?

Again, the creditor, though resident of this state, while he may not institute suit in a foreign jurisdiction in the manner contemplated in section 2356, on a "note, bond, account, or chose in action," yet, so soon as he converts his note, etc., into a judgment against his wage-earning debtor, he immediately becomes "law-proof," so far as concerns the section under discussion, and securing a copy of his judgment may ¹²⁹ do with it as he will, so far as foreign courts and processes are concerned, even against his coresident and wage-earning debtor, and cannot be punished for so doing. This instance affords fresh illustration of the discriminations which the questioned law makes in favor of some creditors and against others—those who live side by side in the same town.

Furthermore, the controverted law does more still: Not content with its rigorous restrictions and severe punishments on creditors resident of this state, it levels its denunciations against all mankind; it comprehends within its forbidding and globe-encircling enactment all creditors who having a note, bond,

account or chose in action within the confines of this state, who dare to send, or cause to be sent, such note, etc., to another state, to institute a suit on it as contemplated in the section under review. Is not such a far-reaching, world-embracing law beyond the power of the legislature to make valid? But the act does not stop even there; it separates wage-earners in a way different from any yet suggested. Only those wage-earners who are in the employ of "any person who is, or firm, company, or corporation which is, subject to the processes of the courts of this state" are under the protection of the statute. If the person, firm, company, or corporation is not subject to such processes, then there is no prohibition against the creditor sending his note, etc., into a foreign jurisdiction for collection.

It is a familiar principle in equity jurisprudence that if a resident creditor brings suit in a foreign jurisdiction to seize upon the wages of a resident debtor, which are exempt under our laws, a court of equity in this state will interpose by injunction to prevent such result, and we have been cited to the case of *Sweeny v. Hunter*, 145 Pa. St. 363, 22 Atl. 653, where an act was under discussion which forbade a resident creditor of Pennsylvania from suing in another state to collect the wages of a debtor resident in Pennsylvania, ¹³⁰ and imposed as a penalty that in case of such collection they might be recovered by the debtor in a court in Pennsylvania.

And from the fact that a court of equity would enjoin such collections in a foreign state, it was argued that the law was valid which allowed the debtor to recover the sum of which he had been deprived by the judgment of a foreign court. Conceding the correctness of this ruling, which is certainly opposed by the vigorous dissent of Judge Miller, concurred in by Judges Field and Harlan in *Cole v. Cunningham*, 133 U. S. 134, 10 Sup. Ct. Rep. 269, and supported by the opinion of the supreme court in the case of *Green v. Van Buskirk*, 5 Wall. 307, 7 Wall. 139, still the ruling in *Sweeny's* case does not cover the present one, because by the provisions of the litigated statute, the act of sending a note out of this state for the purpose, etc., is made a crime.

Under the prohibitions of section 1 of article 14 of the amendments to the constitution of the United States, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Our own constitution contains a provision which declares: "That no person shall be deprived of life, liberty, or property without due process of law": Const., art. 2, sec. 30. And also a provision forbidding the legislature to grant "to any corporation, association, or individual any special or exclusive right, privilege or immunity": Const., art. 4, sec. 53.

And section 2 of article 4 of the constitution of the United States prescribes that: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." As is said by an eminent judge: "The rights thus guaranteed are something more than the mere privileges of ¹³¹ locomotion; the guaranty is the negation of arbitrary power in every form which results in a deprivation of a right": 2 Story on the Constitution, 5th ed., sec. 1950.

"These terms, 'life,' 'liberty,' and 'property,' are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived except by due process of law": State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781.

Now, as elsewhere stated, each of the rights heretofore mentioned carries with it as its natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right. And it has been determined by this court and numerous other courts that no one can be deprived of a vested right of action without infringing on that provision of our constitution and that of the United States respecting the deprivation of life, liberty, and property without due process of law: Leete v. State Bank, 115 Mo. 184, 21 S. W. 788, 141 Mo. 584, 42 S. W. 927. And this court has also determined that it does not lie in the power of the legislature to make that act a crime which consists in the bare exercise of a simple constitutional right: State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781.

The right to bring a suit to enforce a contract is part and parcel of that contract, and one of the essential attributes of property of which the owner cannot be deprived if the organic law of both state and nation be obeyed: People v. Otis, 90 N. Y. 48.

The act under discussion also deprives any creditor as therein mentioned of the equal protection of the laws and abridges the privileges and immunities of citizens of the United ¹³² States, and denies to such creditors those rights which section 2 of article 4 of the constitution of the United States grants to them by declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." A citizen of New York or of California could bring just such a suit as the petitioner has brought and be held wholly blameless.

The act is also obnoxious to the charge that it grants special and exclusive privileges to certain persons or association of persons, and denies the same to others in the same or similar situations. Judge Cooley says: "A statute would not be constitutional . . . which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments": Cooley's Constitutional Limitations, 6th ed., 481-483.

Finally, section 2356 undertakes to arbitrarily separate natural classes of people and to provide different rules of action for each of the dissevered fractions thus unwarrantably formed into a class of its own: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781.

The premises considered, we declare the law unconstitutional on the various grounds hereinbefore set forth, and hence discharge the prisoner.

All concur.

THE POWER OF THE LEGISLATURE TO DECLARE ACTS CRIMINAL is the subject of the monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274.

SPECIAL AND CLASS LEGISLATION is the subject of the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789.

GATES v. SEIBERT.

[157 Mo. 254, 57 S. W. 1065.]

PERPETUITIES—MEANING OF.—Under the rule against perpetuities a remainder over need not vest in possession within the period prescribed by the rule, and it is only necessary to avoid such rule that an interest in such remainder shall vest within the period prescribed.

PERPETUITIES.—VESTED REMAINDERS are not within the rule against perpetuities.

PERPETUITIES—VESTING OF REMAINDER—CHILDREN.—Under a devise to "my son and his wife, if he should marry, and after their decease to their children," the limitation over to such "children" is not within the rule against perpetuities, as upon the birth of such child an estate in remainder vests in him within the period prescribed by such rule.

WILLS—CHILDREN—VESTED REMAINDER.—Under a devise to an unmarried "son, and his wife, if he should marry, and after their decease to their children," the word "children" constitutes a class in whom the remainder vests, the individual share of each child being subject to diminution or increase as births or deaths may occur.

WILLS—CHILDREN.—The word "children," used in a will, means legitimate children, unless something else appears to indicate that a different meaning is intended.

PARENT AND CHILD—RIGHTS OF LEGITIMATE CHILD UNDER WILL.—Under a statute which makes a child born before the marriage of its parents, who afterward marry, and it receives the recognition of its father, legitimate, it is entitled to share with other offspring born of the marriage under a devise to such father's "children."

WILLS—RIGHT OF LEGITIMATED CHILD.—If a testator devises land to his unmarried son and his wife, if he should marry, and after their decease to their children, and such son's first wife, after giving birth to a child, dies, followed by the death of such child, after which the son marries again, and in so doing recognizes and legitimatizes a child born to his second wife before their marriage, such child becomes one of the children of the testator's son within the meaning of the will, and the estate in remainder reopens and lets in such child and the after-born children of the second marriage.

W. B. Thompson, Noble & Shields, and D. C. Taylor, for the appellants.

C. N. Travous, J. W. McElhinney, and Stewart, Cunningham, & Elliot, for the respondents.

263 VALLIANT, J. This is an action of ejectment coming from the circuit court of St. Louis county.

The land was owned by John Gates in his lifetime, who died testate in 1872, leaving surviving him his widow, Levina Gates,

and three children, to wit, Jacob S. Gates (then unmarried), William J. Gates (married), Levina H., wife of Chadwick Gillum. By his will John Gates disposed of all ²⁶⁴ his property, giving most of it to his children. In the first clause of the will the testator directs that his debts be paid, in the second he provides for his widow, and in the third, fourth, and fifth for his three children. The following extracts from the will are sufficient for the purposes of this cause:

"Third. I hereby give and bequeath to my son William Jasper Gates and his wife Eliza, for and during their lifetime and after their decease to his children [description of property].

"Fourth. I hereby give and bequeath to my daughter Levina Maria Gillum and her husband Chadwick Gillum for and during their lifetime and after their decease to her children [property described].

"Fifth. I hereby give and bequeath to my son Jacob Snyder Gates (and his wife if he should marry) and after their decease to his children" the land in suit.

In 1873, after the death of the testator, his heirs deeded all their interest in the land covered by the fifth clause to Jacob S. Gates under the idea that that clause was void. In 1876 Jacob S. Gates married Lizzie A. Cool, who gave birth to a child in September, 1877, and died the next month; the child died the day after its mother. Jacob S. Gates, in November, 1878, married Mary J. Filley, in St. Louis county. At the time he married his second wife she had by him an illegitimate child then about three years old, whom at and after the marriage they acknowledged as his child and ever afterward treated as their legitimate offspring. The child is now Ella Gates Coffman, one of the plaintiffs in this suit. After this marriage there were two children born to them, John J. Gates, one of the plaintiffs here, and Jacob Snyder Gates, Jr., born February 8, 1882, and died July 8, 1882. Jacob S. Gates' wife died in 1884, leaving surviving her her husband and two children, Ella ²⁶⁵ and John, these plaintiffs. In 1886 Jacob S. Gates and his mother executed a deed of trust to secure a debt of ten thousand dollars, which was afterward duly foreclosed and at the sale James C. Ghio became the purchaser; Adam Seibert and others, defendants here, are in possession of the land as tenants of Ghio.

Those facts being shown, the court at the request of the plaintiffs gave the following declarations of law:

"(A) The court declares the law to be that if it finds from the evidence that John Gates, at the time of his death, owned

the real estate described in the petition; that he died in the year 1872, leaving Levina Gates, as his widow, surviving him, and a son, Jacob Snyder Gates; that Levina Gates died before Jacob Snyder Gates, and Jacob Snyder Gates died about the year 1888; that the land mentioned in the will of John Gates as part of the 'Dr. Bates' farm and given to Jacob Snyder Gates, his wife and children, under the fifth clause thereof, is the same property as that described in plaintiffs' petition; that Jacob Snyder Gates was twice married and had by his first wife a child, which lived but a short time, and that his said wife and child both died before Jacob Snyder Gates, and before any second marriage which the court may find was contracted by him; that the said Jacob Snyder Gates thereafter was lawfully married to Mary Jane Filley, and that the plaintiff, Ella Gates Coffman, and John J. Gates, are the sole living children and descendants of Jacob Snyder Gates, and are legitimate children, as such may be described in other declarations of the court; that the said Mary Jane, wife of Jacob Snyder Gates, died before the commencement of this suit, and before the death of said Jacob Snyder Gates; that there was born to Jacob Snyder Gates and his wife, Mary Jane, after their marriage and the birth of plaintiff, John J. Gates, another child, which died an infant before the death of either of its parents; and that the defendants, Adam and William Seibert, were, at the commencement of this suit, ²⁰⁶ in possession of the real estate described—it will render a verdict for the plaintiffs for the recovery of an undivided eleven-sixteenths interest in the land described in the petition and claimed by them, together with such amounts as damages as it may determine under the other declarations made by the court.

“(B) The court declares the law to be that if it finds for the plaintiffs for the recovery of an eleven-sixteenths interest in the land described in the petition, it will assess against the defendants, as damages, a sum of money which will equal two-thirds of the reasonable net rental value of the use, occupation and enjoyment of the premises from the twentieth day of April, 1893, to the present time, as originally sued for, and it will in its verdict fix the value of the monthly rental of eleven-sixteenths of the property at the present time.

“(C) The court declares the law to be that if it finds from the evidence that the plaintiff, Ella Gates Coffman, was the daughter of Jacob Snyder Gates and Mary Jane Filley, and born prior to November 12, 1878; that on said day, November 12,

1878, said Mary Jane Filley and Jacob Snyder Gates were married; and that thereafter Jacob S. Gates recognized the said Ella to be his child by maintaining her in his house and home, treating her as such, and holding her out to the community in which he lived as his child; then the court will find that the said Ella is the legitimate child of Jacob S. Gates.

“(D) The court declares the law to be that the meaning of the fifth clause in the will of John Gates is, that the farm mentioned in that clause should belong to Jacob S. Gates and such person as might be his wife, during their joint lives, and to the one of them who survived the other during his or her life, and that subject to these life interests the children of Jacob S. Gates should become and be the ²⁶⁷ owners in fee simple of the property; that the children of Jacob S. Gates should own such property in equal shares and that the shares of any of his children who might die before him should fall by inheritance to the heirs of such child at its death.”

The court refused the request of the defendant that: “The court sitting as a jury declares the law to be that upon the pleadings and evidence adduced in this action the plaintiffs are not entitled to recover, and the finding and verdict must be for the defendants.” The finding and judgment were for the plaintiffs and the defendants have duly appealed.

The points of difference in the case are in the construction of the will, and the effect of the after-marriage of the parents of the illegitimate child and their recognition of her.

1. It is contended in behalf of defendants that the fifth clause of the will under which the plaintiffs claim is void because it violates the rule of law against perpetuities. The proposition is that under this clause of the will it was possible that the estate attempted to be limited to the children of Jacob S. Gates might not “vest in possession” within the lifetime of a person in being, and twenty-one years and ten months thereafter. Because, it is said, it was not impossible that Jacob Gates, who was unmarried at the time the will took effect, might remain so for twenty years or more, and then marry a woman who was not born when the testator died, and who might survive him for twenty-one years and ten months and thereby postpone the vesting of the remainder to a period beyond the utmost of the law’s indulgence. Authority is quoted to say: “It is not enough that a contingent event may happen, or even that it will probably happen within the limits of the rule against perpetuities; if it can possibly

happen beyond those limits, an interest conditioned ²⁶⁸ on it is too remote": Gray on Perpetuities, sec. 214.

The only point in the proposition as stated by the learned counsel for defendants with which we do not agree is that the limitation must be of such character that it will "vest in possession" within the period prescribed. It must be of such a character that it will become a vested estate, if at all, within the period, but not necessarily vested in possession. An estate is vested in possession only when there is a right of present enjoyment; it is vested in interest when there is a present fixed right of future enjoyment. One of the tests, though not exclusive, is the right of alienation. Some of the authorities hold that the policy of the law against clogging the free alienation of estates is the reason of the rule against perpetuities: 1 Washburn on Real Property, 5th ed., 115. Under our law there is no restriction on the alienation of a vested remainder. The following quotation from Gray on Rule Against Perpetuities states the law correctly: "Sec. 205. A vested interest is not subject to the rule against perpetuities, for *ex vi termini* it is not subject to a condition precedent. Reversions and vested remainders . . . are, for the purpose of the rule against perpetuities, to be considered vested interests. Sec. 206. Therefore an estate which, though now a contingent remainder or executory devise, must, if it is to take effect at all, become a vested interest within twenty-one years after lives in being, is good. . . . Sec. 209. If a remainder is vested—that is, if it is ready to take effect whenever and however the particular estate determines—it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being."

In *Lockridge v. Mace*, 109 Mo. 167, 18 S. W. 1145, there is a quotation from 2 Washburn on Real Property, fifth edition, 760, in which occurs the expression: "The limitation, in order to be valid, must be so made that the estate not only may, but must, vest in possession within the prescribed period." There was no question ²⁶⁹ in respect to a vesting in possession as contrasted with a vesting in interest in that case, and there is nothing in the opinion on that subject. In that case there was an attempted devise to the testator's wife for life, remainder to his son (then seven years old) for life, remainder to his son's children for life, remainder to his son's grandchildren in fee. This court held the devise to be void. Even in the text quoted from, this particular point was not under discussion, and if the words "in possession" had been omitted, the principle that the law-writer

was emphasizing, to wit, that the estate not only may, or probably will, but must, vest within the period, would have been just as clearly stated. The two cases cited in support of the text, *Smith's Appeal*, 88 Pa. St. 492, and *Wheeler v. Fellows*, 52 Conn. 238, sustain the proposition that the estate must vest within the period but not that it must vest in possession. The language used in the *Pennsylvania* case, *supra*, is: "Future estates limited upon a life estate which are not sure to take effect within twenty-one years and the usual fraction after the determination of the life estate are void in their creation."

That the eminent law-writer quoted from never intended to lay down the doctrine that the future estate would be void if there was a possibility that it might not vest in possession during the period prescribed by the rule, is shown by the following quotations from the same author: "An executory devise, in order to be valid, must be so limited that it must take effect, if at all, within a life or lives in being, and twenty-one years and a fraction after, in order to avoid what are called perpetuities in estates. But this does not apply to remainders whether contingent or vested; and one reason is," etc.: 2 *Washburn on Real Property*, 5th ed., 605, 606. There is really no authority for the proposition that the future estate must take effect in possession within the period prescribed by the rule.

270 In the case at bar the limitation over was to the children of Jacob S. Gates, which of course, as he was then unmarried, was contingent upon his marrying and having a child; but the limitation was such that if he should have a child, the estate in remainder would vest in that child certainly within ten months after the death of the father, even though the mother survived him more than twenty-one years. Therefore, we hold that the fifth clause of the will was not repugnant to the rule against perpetuities.

2. We see no difficulty in arriving at the intention of the testator in the fifth clause of the will, even if we read that clause alone, but reading it in connection with the other clauses of the same character wherein the use of like terms are made in providing for the children of his other children, the meaning is beyond question.

The testator had but three children, and in providing for them and their children he uses in each of the three clauses of the will language identical with that in the other two to express the character of the devise. In the third clause the language is: "To my son, William Jasper Gates, and his wife, Eliza, for and

during their lifetime and after their decease to his children" (not their children). In the fourth clause it is: "To my daughter, Levina Gillum, and her husband, Chadwick Gillum, for and during their lifetime and after their decease to her children." And in the fifth clause it is: "To my son, Jacob Snyder Gates (and his wife if he should marry) and after their decease to his children." In each of these clauses the class designated as the remaindermen is the children of the son or daughter named therein, and although the wife and husband named was each provided for in the joint life estate, yet the class to take as remaindermen was not limited to the children of the testator's son or daughter by that wife or husband but to all who would fill the description of children of that son or daughter. And that he contemplated ²⁷¹ that each class might be increased as births might occur is shown by his use of the same words of description in reference to the children of Jacob, who was unmarried, that he used in reference to those of his married children.

The limitation after the life estate in the fifth clause of the will was a contingent remainder until the marriage of Jacob and the birth of a child to him, then the remainder vested in that child as constituting the class named, his individual share being liable to diminution, as the class might increase, by the opening of the estate to let in another person who might thereafter come filling the description. When such an estate becomes vested, when one of the class dies intestate, his share descends to his heirs at law, subject to like diminution by increase of the class as it would have been if he had lived: *Aubuchon v. Bender*, 44 Mo. 560; *Waddell v. Waddell*, 99 Mo. 338, 17 Am. St. Rep. 575, 12 S. W. 349; 2 *Jarman on Wills*, 6th ed., 161-169.

3. The remaining point in controversy relates to the interest of the child born out of wedlock but legitimated by the after-marriage of the parents and the father's recognition of her as his child.

Opposing her claim it is first contended that on the birth of the first child to Jacob S. Gates the remainder vested in it, and upon its death, before the birth of another child, the estate descended to Jacob, the father, as sole heir to his child. But the limitation, as we have seen, was to a class, and although on the birth of the first child the limitation ceased to be a contingent and became a vested remainder, yet it vested in the child as filling the class description, his own share being subject to diminution as the class might thereafter increase; and upon his death it descended to his heir who took subject to the same hazard of

diminution. Therefore, if this legitimated child could have claimed a share in the estate as against the first child in whom the remainder ²⁷² vested, if he had not died, she may claim the same share as against the heirs of that deceased child.

It is immaterial whether the right of Ella, the legitimated child, to come into the class described as children of Jacob S. Gates be determined as of the date of the marriage of her parents or that of her birth, because, if she can come in at all, her interest is the same whether her status bears one date or the other. If she became one of his children in the sense in which the law uses that term on the day of his marriage with her mother, she would then have the same right in this estate as if she had been born in wedlock on that day. When the law uses the word "children" it means legitimate children, and when that word is used in a will or a deed it is to be understood as used in that sense, unless something else appears to indicate that a different meaning was intended. Our statute declares that children born out of wedlock whose parents afterward marry and the father recognizes them as his "shall thereby be legitimated." The word is used without qualification or restriction. There are no degrees of legitimacy; a child is either legitimate or it is illegitimate, and whether it is one or the other depends upon whether or not it comes within the requirements of the law to make it legitimate. A legitimate child under our law is one born in lawful wedlock or of a widow within ten months after the death of her husband, or born before the marriage of its parents, who afterward marry and receives the recognition of its father; and one such child is just as legitimate before the law as the other. The statute has made them equal before the law and the courts cannot make them unequal.

The main force of the argument of the learned counsel for appellants on this branch of the case is directed to their proposition that the statute which makes antenuptial children legitimate is a part of the statute of descents and distribution ²⁷³ and is limited in its effect to inheritance in case of intestacy, having no application to those who claim to take as purchasers under a will.

The two Missouri cases on which the counsel chiefly rely are *Lincecum v. Lincecum*, 3 Mo. 441, and *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359. In the *Lincecum* case, the court was construing a clause of the statute in relation to descent and distribution which was: "The issue of all marriages deemed null in law or dissolved by a divorce shall nevertheless be

legitimate." The parties claiming the benefit of that statute were children of a marriage which took place before the enactment of the statute, and which was illegal because the man already had a lawful wife by a former marriage. It was urged against the claim of the children of this second marriage that the statute was not intended to apply to children of illegal marriages that had taken place before the passage of the law; and also that reading the statute in connection with a provision in the law relating to divorce, which was to the effect that a divorce of the parents should not affect the legitimacy of the children except in cases where the marriage is declared null from the beginning, necessarily excepted the children of the second marriage in that case from the benefit of the statute in question. But the court decided both points in favor of the children of the illegal marriage.

In discussing the second point—that is, the supposed effect of the divorce statute on the statute relating to children of illegal marriages—the court uses this language: "In the first place we are not prepared to admit that these two acts are so far in *pari materia* that they ought to be taken as one act; the one is an act solely for the purpose of pointing out who shall take the estate of an intestate. The other is essentially an act to regulate the granting of divorces. It is ²⁷⁴ true the subject of legitimacy is mentioned in both. In the first act it is mentioned for the purpose alone of pointing out the children who shall take a distributive share of the intestate. In the latter act the subject is only mentioned to prevent the fact of a divorce changing in any wise the capacity of the issue of children when it is granted." It is this language which the learned counsel deem to support their contention that the children there mentioned are legitimate in case of intestacy but bastards for all other purposes. But there was no question of that kind before the court; the case was one of intestacy only, and the question was, Could the children inherit? And the court said in effect that this provision was put in the statute of descent and distribution for that very purpose. That was all that was intended to be said and all that the court could with authority in that case have said. The further language of the court in the same connection is: "Another thing in this case is, that where a person is once clearly and positively legitimate, he ought not to be bastardized by implication or construction. This rule applies with force to this case. The act of descents and distributions clearly make those children legiti-

mate, and being once clearly so, if they are holden to be otherwise, it can only be by implication, argument, and construction." Surely, it would be strange if the court could in one clause of the opinion be understood to say that the children were legitimate for the purpose of inheriting in case of intestacy but bastards for all other purposes, and in another clause of the same opinion say that they were "clearly and positively legitimate."

The other Missouri decision relied upon to sustain the contention of appellants, *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359, deals mainly with questions as to what constitutes a valid marriage, common law or statutory, and also the rights of children of illegal marriages to inherit. There was no will in the case; ²⁷⁵ it was a question of inheritance in a case of intestacy. The contention in opposition to the right to inherit was, the child having died and the father claiming to inherit from it, that whilst the statute would enable the child to take either from her father or mother and to transmit the inheritance to descendants, yet it must be so restricted as not to allow her to transmit the estate to ascendants, especially not to the guilty father. The court said: "No such restriction is found in the law. The act simply declares the child legitimate, and the same act provides for the transmission of the estate, on specified contingencies, from the child to the father. It is in the act regulating descents and distributions that this section concerning the legitimacy of the issue of null marriages is found, and it is for the purposes of this act that the declaration is made. We have no authority upon grounds of public policy or for the promotion of private morals to make restrictions or exceptions which the legislature has not seen proper to make."

That is all we can find in that decision bearing on the point contended for by appellants, and whilst it does say that that clause was put in the statute of descents and distributions for the purpose of the act, yet it is far from saying that such children are to be held quasi legitimate for that purpose but illegitimate for all else, and if it had said so, it would have spoken upon a subject not in the case. The language, instead of being susceptible of that construction, seems to be clearly to the contrary, declaring the act conferring the legitimacy to be without restriction. *Green v. Green*, 126 Mo. 17, 28 S. W. 752, is also referred to. The only point decided in that case was that under the statute, section 4475 of the Revised Statutes of 1889, declaring children of an illegal marriage legitimate, it

was not necessary in order to establish their legitimacy that there should be a decree of court declaring the marriage null.

²⁷⁶ The Maine case to which we are referred, *Lyon v. Lyon*, 88 Me. 395, 34 Atl. 180, was a will case. The testatrix had made a bequest to a class designated as "my nephews and nieces who shall be living at the time of my decease." The question was whether an illegitimate child of parents who afterward intermarried would come in that class, and the court held that it would not. But the statute of Maine was very different from our statute; it did not declare such children legitimate, but only provided that they might inherit from their father as well as from their mother. The language of the Maine statute is: "An illegitimate child born after March 24, 1864, is the heir of his parents who intermarry. And any such child, born at any time, is the heir of his mother. And provided the father of an illegitimate child adopts him into his family, or in writing acknowledges before some justice of the peace or notary public that he is the father, such child is also the heir of his father. And in either of the foregoing cases such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and those from such child and its issues, the same as if legitimate": Maine Laws 1887, p. 11. In that statute the child is treated as illegitimate and is so called; the illegitimate child whose parents never intermarry, but whose father acknowledges it as prescribed, is given the same right of inheritance that is given to the illegitimate child whose parents intermarry. The statute does not in terms or by inference place upon either the seal of legitimacy, but says it may inherit "the same as if legitimate"; whereas our statute says "they shall thereby be legitimated."

The law of Scotland and continental Europe on this subject, to which reference is also made, has a theory of its own altogether different from that of our law. Under that theory which was derived from the civil law, when the parents of an illegitimate child intermarried, the law resorted to a fiction ²⁷⁷ under which it shut its eyes to the true date of the marriage and enforced the presumption that the marriage was antecedent to the birth of the child. But as nothing more substantial than a presumption could be evolved out of that fiction, that presumption was necessarily overthrown when the fact of an intervening marriage occurred. That law, founded on a charitable fiction, would not carry its enforced presumption so far as to invalidate a lawful intervening marriage, or bastardize the legiti-

mate children thereof. Hence, if that were our law governing this case, the marriage of Jacob S. Gates to Lizzie A. Cool in 1876 would prevent this artificial presumption that he was married to his second wife before the birth of Ella; since to indulge that presumption would be to invalidate his first marriage. But that is not our law. Ours is a straightforward statute, indulging in no fiction, neither hiding facts nor misnaming things, simply declaring that an illegitimate child whose parents afterward intermarry shall thereby become legitimate, not quasi legitimate, nor possessing some of the attributes of legitimacy, but legitimate.

The learned counsel for appellant have traced this statute through our revisions back to that of 1825, where it appears as in the act of January 11, 1822, entitled, "An act to direct descents and distributions," and from that fact argue that its effect was intended to be limited to the general purpose indicated in the title to that act. But whilst the statute which was the subject of discussion in the case of *Lincecum v. Lincecum*, 3 Mo. 441, that is, the statute relating to the children of illegal marriages, did originate in the act of 1822 above named, yet the statute we are now dealing with goes back to an earlier date, and when it was first introduced into our law it was in an act relating to both wills and descents. Its history is as follows:

On January 24, 1815, the general assembly of the ²⁷⁸ territory of Missouri passed an act entitled "An act directing the probate of wills and the descent of intestates' real estates and distribution of their personal estates and for other purposes therein mentioned," section 16 of which was as follows: "All posthumous children shall in all cases whatsoever inherit in like manner as if they were born in the lifetime of their respective fathers. And when a man shall have one or more children by a woman, and shall afterward intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated, and capable of inheriting."

That is the first appearance of the provision in question in our law, and, as we see, it came in under an act relating both to wills and estates of intestates, and was contained in the same section that declared the rights of posthumous children. So the law stood until the second session of the first general assembly in 1821-22, when the subjects of wills and descents were divided and an act was passed entitled, "An act concerning wills and testaments," approved December 1, 1821, and an

act entitled, "An act to direct descents and distributions," approved January 11, 1822, and the provisions of the act of 1815, *supra*, both as regards posthumous children and children whose parents afterward intermarry, were carried into the latter act, though in separate sections, and so they were carried forward into the revision of 1825 and thence through all the revisions down to the present. Thus we see that although it now appears in our Revised Statutes under the caption of descents and distributions, and very appropriately so, yet no argument can be drawn from that fact that it was conceived by the law-makers to be limited to estates of intestates, because its first introduction was in an act that related to wills as well. With as much force could it be argued that posthumous children could not take under a ²⁷⁹ devise to a class as children. In the act of 1815 the language was that such children "shall thereby be legitimated and capable of inheriting," but when the subject came up again in 1822, the legislature evidently concluded that when the children were declared legitimate without words of restriction, it would be idle to specify any particular attribute of legitimacy they were to possess, and they left off the words "and capable of inheriting," and in that form it has come down to us to-day. So we conclude that such children are legitimate, and that is all that can be said of them. We hold, therefore, that upon the marriage of her parents, Ella became one of the children of Jacob S. Gates within the meaning of the fifth clause of the will, and that thereupon the estate in remainder, which was then vested in Jacob S. Gates by descent from his deceased child as the representative of the class of remaindermen, opened and let her in as it afterward opened and let in the after-born children of the second marriage.

Counsel for the plaintiffs in their very able brief have collected authorities on this subject, both English and American, which fully sustain the right of the plaintiff, Ella Gates Coffman, to a share in this estate as being one of the legitimate children of Jacob S. Gates: *In re Andros*, 24 Ch. Div. 637; *In re Gray's Trusts* (1892), 3 Ch. Div. 88; *Carroll v. Carroll*, 20 Tex. 731; *Sleigh v. Strider*, 5 Call, 439; *McKamie v. Baskerville*, 86 Tenn. 459, 7 S. W. 197.

4. The criticism of the instruction marked "C," that it omits to require the court to find that the parents of Ella were married in a state where the common law had been changed as it has in Missouri, was doubtless induced by an oversight of the

fact that the record in this case shows that the marriage occurred in this state.

The criticism of instruction marked "A" is that it omits to require the court to find that Gates' child by his first ²⁸⁰ wife survived its mother. That was an undisputed fact in the case; indeed, it was a fact conceded to defendants in the recognition of the interest that Jacob S. Gates inherited from his first child, and is assumed in that instruction by conceding that interest to defendants.

The circuit court took the correct view of this case, and its judgment is affirmed.

Gantt, C. J., Brace and Robinson, JJ., concur.

Sherwood, Burgess and Marshall, JJ., dissent.

PERPETUITIES.—VESTED INTERESTS are not subject to the rule against perpetuities: See the monographic note to *In re Walker*, 49 Am. St. Rep. 121, 122. The continuance of an estate for more than lives in being and twenty-one years does not bring it within the rule against perpetuities, if it must all vest within that time: *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556.

WILLS—CHILDREN, WHO INCLUDED UNDER.—Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, such gift will embrace not only the persons living at the death of the testator, but all who subsequently may come into existence prior to the period of distribution: See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 416-420, on gifts to a class.

WILLS—ILLEGITIMATES.—Generally speaking, a gift to children includes only those who are legitimate; however, children legitimized by a subsequent marriage of their parents may take under a will devising property to "children": See the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 415, 416.

EX PARTE NEET.

[157 Mo. 527, 57 S. W. 1025.]

SUNDAY—GAMES—BASEBALL.—A statute making it a misdemeanor to be guilty of horseracing, cock fighting, or playing at cards or games of any kind on Sunday does not include the game of baseball.

SUNDAY—GAMES—BASEBALL.—Athletic games and sports, such as baseball, on Sunday, are not unlawful unless expressly declared to be so by statute.

HABEAS CORPUS IS A PROPER remedy to restore a person to his freedom of which he has been improperly and illegally de-

prived for an act which is not in contravention of any existing law, or if the statute under which he is held is unconstitutional.

HABEAS CORPUS—SUNDAY—BASEBALL.—Habeas corpus is the proper remedy for obtaining the discharge of a person illegally imprisoned and held for playing baseball on Sunday.

J. S. Blackwell & Son and W. Aull, for the petitioner.

E. C. Crow, attorney general, and C. Vivion, for the respondent.

532 MARSHALL, J. This is a proceeding by habeas corpus, instituted by the petitioner, for the purpose of obtaining his discharge from the custody of the sheriff of Lafayette county and from his imprisonment in the county jail, where he is held under a warrant of commitment issued by the criminal court of that county upon a conviction before that court "on a charge of playing baseball on Sunday," the information simply charging that the petitioner and others therein named, "on the fourth day of June, 1899, at the county of Lafayette and state of Missouri, did then and there unlawfully play at a game of ball, commonly called baseball, on the first day of the week, commonly called Sunday, against the peace and dignity of the state," etc. **533** Among the other persons charged in the information with having played the game of baseball with the petitioner was one R. Vaughn, who was also convicted. He appealed to the Kansas City court of appeals, and that court dismissed the appeal, on the ground that an appeal would not lie from a conviction upon an information: *State v. Vaughn*, 3 Mo. App. 268.

Two questions are presented by this case: 1. Is it unlawful in Missouri to play a game of baseball on Sunday? and 2. Is habeas corpus an available remedy to one convicted and imprisoned for so doing?

1. Section 2242 of the Revised Statutes of 1899 is relied on as furnishing support for the conviction in this case. That section is as follows: "Every person who shall be convicted of horseracing, cock fighting, or playing at cards or games of any kind on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars." This section (then section 1580 of the Revised Statutes of 1879) was construed by the Kansas City court of appeals in the case of *State v. Williams*, 35 Mo. App. 541, to prohibit playing a game of baseball on Sunday. It was conceded that games of baseball are not within the express prohibition of the statute, and it was likewise conceded that "where

particular words of a statute are followed by general—as if, after the enumeration of classes of persons or things, it is added, ‘and all others’—the general words are restricted in meaning to objects of the like kind with those specified.” But it was held that the words, “or games of any kind,” must be construed to embrace games of baseball, because the statute “was evidently intended to prevent a desecration of the Sabbath, by restraining the ⁵³⁴ doing of those things which are offensive to a Christian community, by being done on that day,” and that “the statute was not aiming to prevent the doing of things immoral per se, or the tendency of which is immoral, as the inhibition is not against gambling or betting on the games, but merely against the doing the act on that day, though it be not immoral or tending to immorality.”

At the same (March) term, 1889, the St. Louis court of appeals in the case of *St. Louis etc. Assn. v. Delano*, 37 Mo. App. 289, held that section 1580 of the Revised Statutes of 1879 (now Rev. Stats. 1899, sec. 2242), only prohibited “games of chance or other games of an immoral tendency, and that it does not involve a prohibition of athletic games or sports, which are not of an immoral tendency, but which tend to the physical development of the youth, and are rather to be encouraged than discouraged.” It was also held that the general words, “or games of any kind,” must be construed to mean games of the same kind as the games specially designated in the statute. It was accordingly held that a contract made by the defendants, as members of the Amateur Athletic Association, with the plaintiff for the use of the fair grounds for the purpose of playing athletic games and sports thereon, on Sunday, was a valid contract. But as the decision was in conflict with the decision of the Kansas City court of appeals, in *State v. Williams*, 35 Mo. App. 541, the case was certified to this court: *St. Louis etc. Assn. v. Delano*, 108 Mo. 221, 18 S. W. 1101. This court held that there is no statute in this state which prohibits athletic games and sports on Sunday, unless section 3854 of the Revised Statutes of 1889 (formerly Rev. Stats. 1879, sec. 1580, and now Rev. Stats. 1899, sec. 2242) does so, and after citing that section said: “But these prohibitions are evidently leveled against sports and games that have a demoralizing tendency, and do not extend to mere athletic sports. Besides, this section is penal, and therefore ⁵³⁵ to be strictly construed: *Howell v. Stewart*, 54 Mo. 400; *Fusz v. Spaunhorst*, 67 Mo. 256.” And then added: “But, further, in this instance, the words, ‘or

games of any kind,' fall under the rule which prescribes that where general words follow particular ones, they are to be construed as applicable to things or persons of a like nature: *State v. Bryant*, 90 Mo. 534, 2 S. W. 836, and cases cited; *St. Louis v. Laughlin*, 49 Mo. 559." The decision of the St. Louis court of appeals was approved and affirmed, and while the decision of the Kansas City court of appeals in *State v. Williams*, 35 Mo. App. 541, was not expressly overruled or disapproved, it was referred to as the basis of the action of the St. Louis court of appeals in certifying the case to this court, and therefore the *Williams* case must be regarded as overruled.

Section 2242 of the Revised Statutes of 1899 has been on the statute books of Missouri, in exactly the same words, ever since 1835: Rev. Stats. 1835, sec. 30, p. 209, tit. Crimes and Punishments; Rev. Stats. 1845, sec. 33, p. 405; Rev. Stats. 1855, sec. 35, p. 631; Rev. Stats. 1865, sec. 34, p. 819; Rev. Stats. 1879, sec. 1580; Rev. Stats. 1889, sec. 3854.

Playing a game of baseball on Sunday (or on any other day) could not have been in the minds of the law-makers when this provision of law was enacted in 1835, for the very simple reason that such a game was wholly unknown to art at that time.

The doctrine of *ejusdem generis* is as rock-ribbed in the law of this state as any principle ever announced. As applied to penal statutes especially, it is only a humane doctrine, and accentuates the wisdom of the fathers when they objected to being punished for offenses which had not been declared to be offenses by the law. It observes the respective rights of the different co-ordinate branches of the government by requiring the legislature to enact laws and the judiciary to enforce, but not create, the laws—not even ⁵³⁶ by construction. Baseball does not belong to the same class, kind, species, or genus as horseracing, cock fighting, or card playing. It is to America what cricket is to England. It is a sport or athletic exercise, and is commonly called a game, but it is not a gambling game nor productive of immorality. In a qualified sense it is affected by chance, but it is primarily and properly a game of science, of physical skill, of trained endurance, and of natural adaptability to athletic skill. It is a game of chance only to the same extent that chance or luck may enter into anything man may do. But when chance or luck is pitted against skill and science, it is as fair an illustration of what will result as any test that could be applied.

If the view of the Williams case had been adopted, this statute would have been elastic enough to cover every game that ever was or ever will be invented, no matter whether it was harmless, promotive of physical or mental development, or deleterious to both. It would prevent games of chess, backgammon, jacks, authors, proverbs, faro, keno, and poker alike, and when played on Sunday any one would have been as illegal as any other. Such a construction would have curtailed many of the pleasures of many of our people, without elevating them or improving their moral tone. Until the law-makers expressly provide for such sweeping changes in the lives and customs and habits of our people, it is not proper for the courts by construction to impair their natural rights to enjoy those sports or amusements that are neither mala in se nor mala prohibita—neither immoral nor hurtful to body or soul. We therefore conclude that there is no law in this state which prevents playing a game of baseball on Sunday, and therefore the defendant is imprisoned for the doing of an act which is not unlawful, and therefore the imprisonment is wrongful.

⁵³⁷ 2. The only remaining question is, whether habeas corpus is a proper remedy.

The rule must now be regarded as settled in this state that if a person is imprisoned for an act which is not in contravention of any existing law, or if the act under which he is held is unconstitutional, habeas corpus is a proper remedy to restore to him his freedom of which he has been improperly and illegally deprived: *Ex parte Slater*, 72 Mo. 102; *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557, 30 S. W. 768, 1036; *Ex parte O'Brien*, 127 Mo. 477, 30 S. W. 158; *Ex parte Craig*, 130 Mo. 590, 32 S. W. 1121; *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628.

The underlying reason is that an unconstitutional act is no law at all, and that no court has a right to imprison a citizen who has violated no law of the state, but that such act, even if done by a court under the guise and form of law, is as subversive of the right of the citizen as if it was done by a person not clothed with authority, and hence it is the duty of this court, under section 3 of article 6 of the constitution, to discharge him by means of a writ of habeas corpus. This, too, irrespective of any other relief which may be available to him. For it is the very purpose of this writ to restore freedom to those who have been deprived of it without warrant or authority of law. Of course, it will be understood that habeas corpus will not be allowed to perform the functions of a writ of error or an appeal,

but will only lie where the imprisonment is absolutely without authority of law or for an offense which has not been made an offense against the law, or where the act under which he is imprisoned is unconstitutional, and therefore it is no law at all. This is the plain meaning of sections 5375 and 5378 of the Revised Statutes of 1889.

For these reasons the petitioner is discharged from custody ⁵³⁸ as prayed.

All concur as to first paragraph, and Gantt, C. J., Sherwood and Burgess, JJ., concur also as to second paragraph.

Robinson, Brace, and Valliant, JJ., dissent as to second paragraph.

SUNDAY LAWS—BASEBALL.—The legislature may make it criminal to play baseball on Sunday: See the monographic note to Booth v. People, 78 Am. St. Rep. 264, 265.

HABEAS CORPUS IS A REMEDY for every illegal imprisonment: Commonwealth v. Lecky, 1 Watts, 66, 26 Am. Dec. 37. It is available to test the constitutionality of a statute on which a judgment resulting in the imprisonment of a petitioner is founded: Ex parte Smith, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628.

STATE v. ELLIOTT.

[157 Mo. 609, 57 S. W. 1087.]

GUARDIAN AND WARD—LIABILITY OF SURETIES.—Sureties of a curator are liable only for money or property that actually came into his hands during the term covered by the bond on which they are sureties, and the mere statements of the curator in his settlements that the money or property was in his hands are presumptive evidence only, and not conclusive on the sureties that such was the fact.

GUARDIAN AND WARD—LIABILITY OF SURETIES—CONVERSION OF TRUST FUNDS.—If a curator deposits the funds of his ward in bank in his own name and mingles them with his own, this instantly constitutes a conversion of such funds, for which his sureties for that period are liable as against his sureties upon a subsequent bond who prove a misappropriation of the trust funds before their bond was given, and that no trust funds actually came into the curator's hands during the period for which they were liable for his acts, notwithstanding his statements made in his settlements to the contrary.

H. Gray and McReynolds & Halliburton, for the appellants.

E. O. Brown and M. G. McGregor, for the respondent.

612 MARSHALL, J. This is a suit by Jacobs, curator of the estate of Guy L. and Maud V. Wade, on the official bond of Isaac Fountain, deceased, as public administrator of Jasper county, which bond was approved December 20, 1888. Isaac Fountain was elected public administrator in 1880, and duly qualified with sureties other than the defendants herein. He was re-elected as such administrator in 1884, and duly qualified likewise with other sureties. On February 13, 1888, he was ordered by the probate court to take charge of the estate of the said minors and did so. On April 23, 1888, as such curator he collected \$1,962.29 belonging to the estates of said minors, and on May 20, 1888, **613** he collected for such estates the further sum of \$1,500. He deposited the amounts so collected in the First National Bank of Carthage on the days they were respectively collected, in his individual name. On April 26, 1888, he commenced checking against his account in the bank, and continued to do so, with the result that on the 20th of December, 1888, he had not only drawn out of the bank the whole amount so deposited, but his account with the bank was overdrawn \$83.71. At the regular election in 1888 he was elected for the third time as such public administrator, and gave the bond here sued on with John Roesch and Moses Elliott as sureties, which was approved on December 20, 1888. Thereafter he continued to make settlements in which he charged himself with said amounts so collected, and interest thereon, and took credit for charges and expenditures, until his death in January, 1897. After his death his widow, as his executrix, made a settlement in the probate court in which she showed that he owed the estate of said minors \$4,235.28. His executrix found among his papers only one note payable to him as curator of the Wade children, for \$300, which was secured by mortgage on real estate. John Roesch, one of the sureties aforesaid, had died in the meantime, and W. B. Kane was his duly appointed administrator. The amount so shown by the executrix not having been paid to the relator as the new curator of the estates of said minors, this action was instituted by him on the bond approved December 20, 1888, against Nancy Fountain, as executrix of Isaac Fountain, W. B. Kane, as administrator of the estate of John Roesch, and Moses Elliott, the sureties on said bond. The trial developed the facts here stated.

The court gave and refused instructions as follows:

"1. The court declares the law to be that if the court finds from the evidence that at the time of approval of the bond sued

on in this case, Isaac Fountain, as curator of the ⁶¹⁴ Wade heirs, had used the assets of said estate in private business, and did not have them in hand, although he was solvent, then the findings should be in favor of the defendants Elliott and Kane, notwithstanding the fact that Fountain kept up his settlements as curator of said heirs, and charged himself up as though he had the money in hands.

"2. The court declares the law to be that if the court finds from the evidence that said Fountain did not have the estate of the Wade heirs in hands at the time of execution and approval of the bond sued on, but had used it in private business prior to said time, and that said Fountain was not solvent, then the fact that he charged himself up in settlements of the heirs of said estate is not binding upon Elliott and Kane, and the finding of the court will be in their favor."

The defendant asked and the court refused to give the following instructions:

"3. The court declares the law to be that under the pleadings and evidence in this cause the finding must be for the defendants Elliott and Kane.

"4. The court declares the law to be that Isaac Fountain being public administrator in February, 1888, and having been ordered by the probate court of Jasper county, Missouri, to take charge of the estate of the Wade heirs, and having taken charge of said estate as such public administrator during his then existing term of office, his having been re-elected public administrator in 1888, and his having given a new bond on December 20, 1888, that said new bond did not become liable for the estate of the said Wade heirs in the hands of said Fountain."

At the request of plaintiff the court gave the following instructions:

"1. The court declares the law to be that under the evidence the plaintiff is entitled to recover, and the court should find the issues in favor of the plaintiff in the sum of ⁶¹⁵ \$10,000, the penalty of the bond sued on, and assess the relator's damages thereon at the amount shown to be due by the surrender settlement of Nancy C. Fountain, executrix, together with six per cent interest thereon from the eighth day of May, 1897.

"2. Even if Isaac Fountain had deposited the money of his wards in the bank, and he had withdrawn the same from such deposit before giving the bond sued on, the court declares the law to be that the legal presumption arising therefrom would be that such withdrawal was for the purpose of loaning and invest-

ing said money as the law directs, and that it was not for the purpose of converting said money to his own use. And it devolves upon the defendant to rebut said presumption by showing from the evidence that said Fountain after such withdrawal converted said money to his own use before the bond sued on was given.

"3. The mere fact that Fountain had no money in bank to his credit, either in his individual capacity or as curator of said minors, at the time the bond sued on was given, is not inconsistent with the presumption that his wards' money had been withdrawn for loaning and investing as the law directs; nor is such fact sufficient to overcome the presumption arising from the statements in his annual settlements showing a balance on hand carried forward to his wards' credit, or the final accounting by his executrix with his successor, on which a balance of \$4,097.60 is shown to be due.

"4. The annual settlements of Isaac Fountain as such curator and the settlement of his executrix are evidence against the defendants and presumptive evidence as to the amount of their liability in this action, and it devolves upon the defendants to show by evidence sufficient to outweigh or overcome the presumption arising from said settlements ⁶¹⁶ that defendants are not liable, and that the liability is alone against the former bond of said Fountain."

The court gave judgment for the plaintiff for the full amount sued for, and the defendant Kane, administrator of Roesch, and Elliott appealed.

1. It is apparent from the instructions given for the defendant that the trial court properly declared the law as to the liability of the sureties to be that they are only liable for money or property that actually was or came into the hands of the curator during the term covered by the bond on which they were sureties, and that the mere statements by the curator in his settlements that the money or property was in his hands are not conclusive on the sureties that such was the fact. This is in accordance with the law: *State v. Branch*, 126 Mo. 448, 28 S. W. 439; 134 Mo. 592, 56 Am. St. Rep. 533, 36 S. W. 226; 151 Mo. 637, 52 S. W. 390. In the case cited, Branch was curator of Alice Crooks, and while acting as such he mingled the trust funds with his individual funds, and lost both. Afterward he became her trustee, and as trustee receipted to himself as curator for the trust fund, and, upon exhibiting his final settlement as curator to the probate court showing that the trust fund was in his

hands, that court ordered him to turn over the fund to himself, as trustee, and upon his exhibiting his receipt therefor as trustee, to himself as curator, the probate court approved his final settlement and discharged him as curator. When the minor became of age, Branch did not turn over the trust fund to her, and suit was brought against him as trustee and his sureties on his bond as trustee. This court held that the sureties on his bond as trustee were not liable, because no assets came into his hands as trustee. This court, in *Bank*, speaking through Robinson, J., said in that case ⁶¹⁷ (*State v. Branch*, 151 Mo. 637, 52 S. W. 390): "A person holding funds in one fiduciary capacity cannot by his own election shift the responsibility therefor from one set of sureties to another. He cannot, as already seen, by signing a receipt to himself in the capacity of trustee, without having any funds at hand, transfer his liability and that of his sureties as curator to himself and his sureties as trustee. It can only be done by the transfer of substantial assets. By the filing of the receipt in the probate court he solemnly declared and asserted that from that time it was his intention to hold the estate as trustee and not as guardian, but if he did not have the estate in his hands, and by reason of his insolvency was unable to turn over the estate, he could and did not come into possession of the funds in the capacity of trustee, and thus as guardian he failed to carry out the order of the probate court, and for such dereliction of duty his bondsmen [as curator] were liable to the extent of the amount of the estate found by the probate court on final settlement to be in his hands [as curator]."

Thus the trial court properly declared the law in this respect. Counsel for the plaintiff, however, is not content with this, but goes further and says: "We contend: 1. That even if the defalcation occurred before the giving of the bond sued on, that charging himself in settlements and bringing balances down from one annual settlement to another made Fountain's securities under this last bond liable as well as the first; 2. That the presumption is that the last bond is alone liable, and there is no evidence to overcome the presumption, and hence the relator would not be justified from the evidence to look to the former bond."

The first branch of this contention is settled adversely to the plaintiff by the decisions of this court in *State v. Branch*, 112 Mo. 672, 20 S. W. 693, 126 Mo. 448, 28 S. W. 739, 134 Mo. 592, 56 Am. St. Rep. 533, 36 S. W. 226, 151 Mo. 622, 52 S. W. 390, wherein it was held that the ⁶¹⁸ sureties are only liable

for assets actually in the hands of the principal in the bond during the term for which they are sureties, and that to hold that the mere ex parte statements of the principal, such as settlements or receipts, that he has such assets in his hands during such term are conclusive against the sureties that such is the fact, "would be to confound all notions of right and wrong," and "cannot be tolerated in a court of justice."

The decisions referred to by the plaintiff only go to the extent of holding that such settlements are presumptive evidence that the money was in the hands of the principal in the bond, but this is qualified by the statement that this is true, "nothing more appearing" (State v. Paul, 21 Mo. 56), or "where it is not shown that the defalcation occurred during such prior term": United States v. Dudley, 21 D. C. 337. Such presumptions are always subject to be overcome by proof of the actual facts, and the facts, when ascertained, control the case in preference to any presumption.

2. The instructions given for the plaintiff clearly show that the trial court believed that the evidence adduced was not sufficient to show that the defalcation in this case occurred during a prior term of the public administrator, but did not show that it occurred during the term for which the defendants were sureties.

There is no conflict in the testimony, and therefore the legal effect of the uncontradicted evidence is open to inquiry in this court.

The bond sued on was approved December 20, 1888. The principal on the bond was the public administrator, and this bond was given to cover his acts during his third successive term. During his second term, he collected the money, and deposited it in the bank in his own name, and ⁶¹⁹ mingled it with his individual funds. He checked against it and on the day this bond was approved he had drawn it all out of the bank and was overdrawn \$83.71. After his death the only trace of any of this trust money was a note for \$300, payable to him as curator of the estate of these minors and secured by a mortgage on real estate. The probate court records do not show any loans of this fund reported by him or approved by the court, and the records of Jasper county show that the \$300 mortgage is the only mortgage ever held by him, so far as such records can speak. The trial court held that this state of facts was not sufficient to overcome the presumption arising from the annual settlements, as the legal presumption arising from such withdrawal of the trust

funds from the bank is that it was done for the purpose of investing it for the benefit of the trust and not for the purpose of converting it to his own use. But in so holding the trial court overlooked the pregnant fact disclosed by the evidence that he never did loan the trust fund, except the three hundred dollars; never reported any such loan or obtained the approval of the probate court of any loan as was his duty to do annually (Rev. Stats. 1889, sec. 5318), and that the records of Jasper county do show that he never had any loan, secured by real estate, except the \$300 loan, and he could only loan "on prime real estate security" (Rev. Stats. 1889, sec. 5318), and after his death no evidences of any loan, except the \$300 loan, were found.

This is as strong proof of a negative pregnant as could be made. The instant he deposited the money in the bank in his own name and mingled it with his individual funds, it constituted a conversion of the trust fund, and "such conversion could only be excused and his bondsmen [for that period] relieved of their liability by showing that he had the cash actually in hand": *State v. Branch*, 151 Mo. 637, 52 S. W. 390.

It could not reasonably be expected that the sureties ⁶²⁰ could prove to whose order each of the checks on his bank had been drawn, and thus affirmatively show by the payees of such checks that the money was loaned to them, for when a depositor's account with his bank is balanced, the checks are returned to the depositor, and the books of the bank only show how much he deposited, and when it was deposited, and how much he drew out, and the amount of each check, but do not show the names of the payees of the checks. When, therefore, it was shown that the trust fund had all been drawn out of the bank before this bond was given, and that no loans (except the \$300) were ever made by him on prime real estate security, evidenced by mortgages properly recorded, and that no evidences of any such loans were found after his death, the conclusion becomes irresistible that there was a misappropriation of the trust funds before this bond was given, and that no trust funds actually came into his hands during the term for which these sureties were responsible for his acts, and that the presumptions of law arising from his settlements and that are indulged that every officer or person does his duty have been completely overcome by the facts proved, and that these sureties are not liable. For this reason the circuit court erred in not so holding.

This necessarily disposes of the further contention of the plaintiff, that the failure of the curator (who was dead at the

time) to turn over the amount found to be due by him to the estates of these minors, constitutes a breach of this bond, and that these sureties are liable for such failure no matter whether any money ever actually came into his hands during the term covered by this bond or not.

The judgment of the circuit court as to the sureties, Kane, administrator of Roesch, and Moses Elliott, who are the only appellants here, is therefore reversed.

All concur.

GUARDIAN'S BOND, LIABILITY ON.—The investment of a ward's money by a guardian in his own business is a conversion of such money, for which he becomes immediately liable on his bond: *State v. Sanders*, 62 Ind. 562, 30 Am. Rep. 203. See, also, *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360. The liability of different sets of sureties on guardians' bonds is considered in the monographic note to *Culliford v. Walser*, 70 Am. St. Rep. 445.

OFFICIAL BONDS.—THE DEFAULTS OF A PRIOR TERM are not chargeable against the sureties on an official bond for a subsequent term: Monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 844. See, further, *Plymouth County v. Kerseboom*, 108 Iowa, 304, 75 Am. St. Rep. 257, 79 N. W. 67; *O'Brien v. Murphy*, 175 Mass. 253, 78 Am. St. Rep. 487, 56 N. E. 283.

JACKSON v. KANSAS CITY, FORT SCOTT AND MEMPHIS RAILROAD COMPANY.

[157 Mo. 621, 58 S. W. 32.]

RAILROADS—NEGLIGENCE—SPEED OF TRAIN.—A city ordinance limiting the speed at which railroad trains may be run within its limits applies to all parts of such city, whether in or out of railroad yards therein.

EVIDENCE—MUNICIPAL ORDINANCES.—In an action based on the violation of a city ordinance it is not necessary, in order to introduce the ordinance in evidence, to allege and prove the incorporation of the city, that it has a special charter, or the class to which it belongs, as the court takes judicial notice of these facts.

EVIDENCE—MUNICIPAL ORDINANCES.—If a book, duly labeled, containing an ordinance upon which an action is based, is produced by the mayor of the city, who testifies that it is the journal of the proceedings of the board of aldermen, including the city ordinances as adopted, such book and ordinance are thereby rendered admissible in evidence.

RAILROADS.—ORDINANCES REGULATING SPEED OF TRAINS within city limits are police regulations, and the power to thus regulate them need not be given in express terms, but may be

implied from the power of the city to abate nuisances and provide for the general welfare.

RAILROADS—NEGLIGENCE—VIOLATION OF MUNICIPAL ORDINANCE.—A widow is entitled to recover from a railroad company for the death of her husband caused by being run over by a train run at a greater rate of speed than is permitted by a city ordinance, unless he was guilty of negligence contributing thereto. In such case the violation of the ordinance is negligence per se, and it is immaterial whether or not there is a contract between the railroad company and the city to comply with such ordinance, or whether the former has in fact accepted its provisions.

RAILROADS—NEGLIGENCE—TRESPASSER—VIOLATION OF ORDINANCE—EVIDENCE.—In an action to recover for the death of a trespasser on a railroad track alleged to have been caused by the speed with which the train was being run in violation of a city ordinance, the burden of proof is upon the plaintiff to show that the death was caused by the excessive speed of the train, and the question whether the violation of the ordinance was the cause of the death is for the jury to determine.

RAILROADS—TRESPASSERS—CARE REQUIRED OF.—The law requires of an aged trespasser upon a railroad track such degree of care and caution as is commensurate with his mental condition, and the jury should be instructed as to the degree of care required of him, and as to what lack of reason and understanding would excuse him from the effects of his own carelessness.

RAILROADS—TRESPASSERS—PRESUMPTIONS.—An engineer in charge of a railroad train has the right to presume that a trespasser walking along the track is in possession of all of his faculties, and of sufficient intelligence to avoid danger; and if he is in a place of safety when the engineer first discovers him, the latter has a right to presume that he will not go upon the track in front of the approaching train, and need make no effort to stop until he discovers that the trespasser intends to, or is starting to go upon the track; but it is then his duty to use all reasonable means at his command, consistent with the safety of the train and its passengers, to avoid injuring the trespasser on the track.

RAILROADS—CONTRIBUTORY NEGLIGENCE.—If an old man, impaired in mind and body, is in the habit of wandering away from home, but not into places of danger, and on a certain occasion thus wanders away and gets upon a railroad track, where he is killed by a passing train, the fact that his wife, also an aged woman, was temporarily away from home on business at the time of the accident is not such contributory negligence on her part as prevents her from recovering for his death.

W. Pratt, W. J. Orr, and I. P. Dana, for the appellant.

A. H. Livingston, for the respondent.

627 BURGESS, J. This is an action by the widow of Samuel Jackson, deceased, to recover of defendant the sum of five thousand dollars for the death of her husband, which occurred June 12, 1895, at West Plains, Missouri, through being struck by one of defendant's passenger trains as he was walking across the railroad track in its yards at that place.

The petition alleged "that on said day and long prior thereto there was duly passed and in force an ordinance in the said city of West Plains, regulating the speed of railroad trains and cars within the corporate limits of said city, and prohibiting and making it unlawful for trains and cars to be run within said corporate limits at a greater rate of speed than six miles per hour; that on the said twelfth day of June, 1895, the said Samuel Jackson started across defendant's said railroad track near its depot in said city of West Plains and within the corporate limits of said city, and at a point where divers persons ever have and do cross said track, and while so crossing said track and just as he was across and leaving the same, he, the said Samuel Jackson, was struck and instantly killed by one of defendant's passenger trains, then and there being run and operated by defendant's agents, servants, and employés; that the said Samuel Jackson was, at the time of his death, eighty-eight years of age, and feeble and infirm in body and in mind; that at the time said Jackson was struck and killed as aforesaid by defendant's train of cars as aforesaid, the said train was being run negligently and carelessly at a great rate of speed, and far in excess of six miles per hour. Plaintiff says that by reason of the negligence and carelessness of defendant's agents, servants, and employés, in running and operating said passenger train at a great and rapid speed and in violation of said ordinance in said city of West Plains, the said Samuel Jackson ⁶²⁸ was struck and killed, by reason of which plaintiff says she is damaged in the sum of five thousand dollars, for which she prays judgment."

The defenses were a general denial, that deceased was a trespasser upon defendant's tracks, that his death resulted from his own negligence, and negligence upon the part of plaintiff in permitting her husband to wander away from his home unattended, and to walk along and upon defendant's track at the time and place where the accident occurred.

Deceased was far advanced in life, being at the time of his death over eighty-eight years of age, and very feeble in body and mind. His disposition was to wander away from home. His mental weakness was such that he could not remember localities, and, after being absent from home a few hours, upon being returned thereto he would not at times recognize it. On the morning of the accident, the plaintiff, after washing the breakfast dishes, went to a grocery store to purchase something for dinner. When she left, deceased was sitting outside of the

house, but during her absence he had gotten up and gone elsewhere, and she started out to find him. She had gone but a short distance when she was informed that he had been struck by a train. At the time of the trial she was seventy-two years of age. They were poor people and lived alone.

It does not appear where deceased was or went after his wife left him outside his house, until he was seen walking westerly between defendant's tracks in its yards at West Plains north of its stockyards and between the public crossings of two streets, Lincoln and Washington avenues, which are about eight hundred feet apart.

Defendant's main track runs through West Plains in an easterly direction, crossing a bridge or trestle as it approaches from the west on a slight curve, running thence about three hundred feet to the crossing of Lincoln avenue, just west ⁶²⁹ of which a sidetrack branches off on the southern side of the main line. From Lincoln avenue the tracks run in practically a straight line through the railroad yards, past the stockyards, coal-house, a warehouse, and the freight depot, a distance, as has already been stated, of about eight hundred feet, to Washington avenue. About one hundred and thirty feet east of the Lincoln avenue crossing, another sidetrack branches off on the north side of the main line and runs easterly. It was near this point of divergence of the north sidetrack (just west of it) that deceased was struck by the train, which was a regular passenger train coming from the west. The west end of the passenger station is about one hundred and fifty feet east of Washington avenue crossing, and therefore about eight hundred and twenty feet east of the point of collision, about nine hundred and fifty feet east of the Lincoln avenue crossing, and about twelve hundred and fifty feet east of the bridge or trestle referred to.

When first seen about the railroad yards, deceased was walking between defendant's main track and the south sidetrack in a westerly direction, and was some two hundred feet east of Lincoln avenue. There was a wide space between the tracks of some six or eight feet, filled up with cinders, making a sort of path from Lincoln avenue crossing eastward to Washington avenue.

Mr. Jackson was walking along slowly between these tracks in a place of perfect safety, facing west, with the train approaching him from the west, and, when only about thirty feet, or, at the outside, sixty feet, from the train, he turned at right angles to the north and stepped upon the track on which

the train was approaching. The engineer immediately applied his air-brakes, sounded an alarm, and did everything possible to stop the train, but before he could accomplish it the engine struck the old gentleman and knocked him off the track on the north side. When the train stopped he was about three car-lengths behind the engine—that is, the train had not entirely passed his body.

⁶³⁰ The evidence shows what the engineer did, as soon as and after deceased started to step upon the main track, and there is no suggestion in the testimony that anything else could have been done to stop the train quicker than it was stopped, or that anything could have been done by defendant's employés which would have prevented the collision.

Over defendant's objection, the city's mayor was allowed to read, from what he said was the journal of the proceedings of the board of aldermen, a section of an alleged ordinance as follows:

"Sec. 2. No locomotive engine or train of cars shall be run within the corporate limits of this city at a greater rate of speed than ten miles per hour; provided, further, that the rate of speed of such locomotive engine or train when crossing any street crossing shall not exceed the rate of six miles per hour."

And said witness was also permitted to testify orally that the ordinance was "passed and approved February 16, 1894."

There was evidence tending to show that at the time of the accident the train was running at a greater rate of speed than ten miles per hour, but upon this question the evidence was conflicting. The engineer testified that he saw Jackson when in about thirty or forty feet of him, and that he then applied the air-brakes and reversed the engine's power, and that he judged in passing over Lincoln avenue he was running eight or nine miles per hour.

At the close of all the evidence defendant interposed a demurrer to the evidence, which was refused, and it duly excepted.

Then, at the request of plaintiff, the court, over the objection of defendant, instructed the jury as follows:

"1. In arriving at the fact as to whether the negligence of the deceased, Jackson, contributed to his death, you should consider his mental condition; and if you find from the evidence ⁶³¹ that at the time of his death he was devoid of reason and understanding from infirmity of mind, then the law does not impute to him such contributory negligence as will bar a

recovery in this case, and you will find for the plaintiff, provided you further find from the evidence that his death was caused by the negligence of the defendant in running its train at a greater rate of speed than ten miles an hour in the corporate limits of the city of West Plains.

"2. The court further instructs the jury that although you may find from the evidence that it would have been negligence in a person of ordinary reason and comprehension to start across the track as deceased did when killed, still, if you find from the evidence that his mind and mental faculties were impaired, and by reason of such condition of mind and understanding he could not comprehend the danger to which he was exposed in attempting to cross such track, then the jury will take these facts into consideration in passing upon the question of said Jackson's alleged contributory negligence.

"3. The court instructs the jury that if you believe from the evidence that at the time the deceased, Jackson, was struck and killed by defendant's train of cars, such engine and cars were being run at a greater rate of speed than ten miles in the corporate limits of the city of West Plains, and that by reason of such running of cars the said Jackson was struck and killed without negligence on his part contributing to his death, then you should find for the plaintiff in the sum of five thousand dollars."

Defendant asked and the court refused the following instructions:

"1. The court instructs the jury that although you may find and believe from the evidence that defendant's train of cars, at the time Samuel Jackson went onto the railroad track, was running at a greater rate of speed than that allowed by the city ordinance, to wit, ten miles per hour, ⁴³² still you cannot find for the plaintiff unless you further find from the evidence that after the engineer discovered that said Jackson was intending to cross the track, he, the said engineer, could have stopped the train in time to have prevented the striking, had he been running not to exceed ten miles per hour.

"2. The court instructs the jury that if you find that Samuel Jackson was in a place of safety before he stepped onto the track and when the engineer first discovered him, then the engineer had the right to presume that he would not go onto the track in front of an approaching train, and the engineer was not required to make any effort to stop said train until he discovered that said Jackson intended to or was start-

ing to go onto the track. And the engineer had the right to presume that the said Jackson possessed reasonable intelligence sufficient to avoid danger, in the absence of evidence that the engineer knew the said Jackson was mentally deranged or of unsound mind."

These instructions the court refused to give, but modified the second by adding thereto: "Provided the train was not being run at a greater rate of speed than ten miles per hour," and gave the same as modified. To the action of the court in refusing these instructions as asked, and in modifying the second and then giving it, defendant duly excepted. Thereafter the jury returned a verdict in favor of plaintiff for the sum of five thousand dollars damages. After an unsuccessful motion for a new trial, defendant appeals.

It is first insisted that the demurrer interposed to the evidence by defendant should have been sustained, and that the court erred in overruling it.

The case stated in the petition was a violation by defendant of a duty imposed by an ordinance of the city of West Plains, in running a train within the limits of the city and at a place where persons were in the habit of crossing ⁶³³ its tracks at a greater rate of speed than six miles per hour, and the contention is that no such case was proven.

It is true that the deceased was not crossing the track when struck and killed, at a place where people were in the habit of crossing, but in defendant's yards, where there were two side-tracks, one on each side of the track on which the train was moving, yet these facts did not absolve defendant from the observance of the ordinance, if valid, as it applied alike to all parts of the city, whether in or out of defendant's yards: *Merz v. Missouri Pac. Ry. Co.*, 88 Mo. 672; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645, 11 S. W. 736; *Prewitt v. Missouri etc. Ry.*, 134 Mo. 615, 36 S. W. 667; *Blue-dorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103. And the question as to whether or not the train was running at a rate of speed prohibited by the ordinance at the time of the accident was, we think, under the evidence, for the consideration of the jury.

Nor do we think it was necessary, in order to the introduction of the ordinance in evidence, that the petition should specifically allege that West Plains was incorporated under the general law, or that it had a special charter, or the class to which it belonged. It was held in *Brookfield v. Tooev*, 141

Mo. 619, 43 S. W. 387, that the statutes of this state require all courts to take judicial cognizance of the organization of cities of the third class (Rev. Stats. 1889, sec. 1465), and that a complaint by a city of that class against a merchant for selling goods without a license was not bad because it did not designate the class of municipal corporations to which it belonged. The statutory provisions with respect to cognizance by courts of the incorporation of cities of the third and fourth class are substantially the same (Rev. Stats. 1889, secs. 1465, 1579), and it was held in the case of *Savannah v. Dickey*, 33 Mo. App. 522, in a proceeding by that city against the defendant for the violation of its ordinances, that it was not necessary to allege or prove its incorporation, as the court would take judicial notice that Savannah was a city of the fourth class.

⁶³⁴ The petition alleges that the defendant railroad runs through the city of West Plains; that there was duly passed and in force at the time of the accident an ordinance in said city, regulating the speed of railroad trains and cars within its corporate limits, thus in effect alleging that West Plains is a municipal corporation, for such is the meaning of the word "city," and this court will, under the authorities cited, take judicial notice of its classification, and that it is a city of the fourth class.

By section 1601 of the Revised Statutes of 1889, the board of aldermen of a city of the fourth class is required to keep a journal of its proceedings, and the acts and ordinances of such corporation are evidenced by the entries in such journal: 1 *Dillon on Municipal Corporations*, 4th ed., sec. 310; 1 *Greenleaf on Evidence*, 15th ed., sec. 86; *Stewart v. Clinton*, 79 Mo. 603. The book containing the ordinance upon which this action is based was produced by the mayor of the city, who testified that it was the journal of the proceedings of the board of aldermen, including the ordinances as adopted. It was entitled, "Revised Ordinances of the City of West Plains, in the County of Howell and State of Missouri," and no error was committed in permitting it to be read in evidence.

But defendant contends that the petition failed to state a cause of action, for the reason that there was no allegation of any contract between defendant and the city to comply with the ordinance which was the basis of the action, in the absence of which it did not show the existence of a civil duty owed by defendant to deceased and enforceable against it at common law. *Fath v. Tower Grove etc. Ry. Co.*, 105 Mo. 545, 16 S. W. 913,

Senn v. Southern Ry. Co., 108 Mo. 152, 18 S. W. 1007, Sanders v. Southern etc. Ry. Co., 147 Mo. 411, 48 S. W. 855, Byington v. St. Louis R. R. Co., 147 Mo. 673, 49 S. W. 876, Murphy v. Lindell Ry. Co., 153 Mo. 252, 54 S. W. 442, and Moran v. Pullman Palace Car Co., 134 Mo. 641, 56 Am. St. Rep. 543, 36 S. W. 659, among decisions by other courts, are relied upon to sustain this contention.

⁶³⁵ The doctrine contended for by defendant was first announced by this court in Fath's case, *supra*, which was an action for damages for injuries sustained by plaintiff by reason of the negligence of defendant in failing to observe the provision of an ordinance which defendant had contracted to comply with, and what was said with respect to the question now under consideration was unnecessary to a decision of the case.

Moreover, the question was not discussed, the court merely observing, "it may be admitted, at the outset, that it is beyond the power of a municipal corporation by its legislative action directly to create 'a civil duty, enforceable at common law,' for this is an exercise of the power of sovereignty belonging alone to the state. This position is fully sustained by the authorities cited on behalf of defendant." The authorities cited on behalf of defendant in that case upon this question were: *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Philadelphia etc. R. R. Co. v. Ervin*, 89 Pa. St. 71, 33 Am. Rep. 726; *Vandyke v. Cincinnati*, 1 Disn. 532; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *Jenks v. Williams*, 115 Mass. 217. Of these *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502, *Vandyke v. Cincinnati*, 1 Disn. 532, and *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603, were suits for damages against adjoining property holders for injuries sustained by reason of the accumulation of snow and ice upon the sidewalks of cities which the owners of the adjoining property were required by ordinance to remove, and had failed to do so.

The other cases were of a similar character, and all of them are clearly distinguishable from cases founded upon the violations of city ordinances for the protection of life and property, which all cities in this state have the right to pass, as police regulations, such as the moving of trains within their corporate limits at an excessive rate of speed.

The city ordinance in question was intended for the protection of life and property within the city, and all persons ⁶³⁶ while moving about would have the right to depend upon the

ordinance being observed, and to govern themselves accordingly: *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; *Wright v. Malden etc. R. R. Co.*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136.

"On the other hand, where the duties enjoined are due to the municipality or to the public at large, and not as composed of individuals, a different rule is intended to apply. This is well illustrated by the cases of *Kirby v. Boylston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682, and *Flynn v. Canton Co.*, 40 Md. 312, 323, 17 Am. Rep. 603, in which it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. This proceeds upon the ground that it is the sole duty of the city to keep the streets in good repair, and clear of snow and ice. The work done, and fines or taxes collected, in such cases, to the extent thereof, are to be considered as so far in aid of the city in the discharge of its duty: See, also, *Taylor v. Lake Shore etc. Ry. Co.*, 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502. And so, also, generally of ordinances or statutes relating specially to duties due strictly to the corporation or state.

"The analogy between statutes and the ordinances of cities is, of course, not to be extended beyond the proper limits of municipal jurisdiction. But in matters properly of local cognizance it is necessary and eminently proper that such power should be committed to the municipality, to be exercised through ordinances which shall be subordinate to and consistent with the general laws, or in proper cases be authorized to take their place: *Cooley's Constitutional Limitations*, *199. An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other laws of the commonwealth, ⁶³⁷ and all persons interested are bound to take notice of their existence: *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 670; *Vandine's Case*, 6 Pick. 187, 17 Am. Dec. 351; *Gilmore v. Holt*, 4 Pick. 257; *Johnson v. Simonton*, 43 Cal. 242, 249"; *Bott v. Pratt*, 33 Minn. 327, 53 Am. Rep. 47, 23 N. W. 237.

A broad distinction exists between the ordinances which impose burdens upon individuals or corporations for the accom-

modation or convenience of the public, such as the improvement, repairing, and moving snow and ice from the sidewalk, and ordinances imposing burdens for the protection of life and property: *Platte etc. Milling Co. v. Dowell*, 17 Colo. 376, 30 Pac. 68.

With respect to streets and sidewalks in cities the duty rests upon the municipalities in which they are located to keep them in reasonably safe repair for travel, and for failure to do so, and injury sustained by reason of such failure, they are responsible in damages, but no such burden can be shifted to or imposed upon any person or property holder without his consent, because in no sense a police regulation, while the regulation of the speed of trains within the corporate limits of cities is a police regulation.

The same ordinance upon which the *Fath* case was predicated was before this court again in *Senn v. Southern Ry. Co.*, 108 Mo. 152, 18 S. W. 1007. The case last mentioned was an action for damages for the death of a child, by its parents, alleged to be due to the negligence of the driver of a street horse-car. The negligence charged was the failure of the driver to observe the requirement of the ordinance. The court, on page 152 (108 Missouri), said: "The objection urged is to that part of the ordinance which requires the driver, 'on the first appearance of danger' to children and others, to stop the car 'in the quickest time and space possible.' The same ordinance was before this court in *Fath v. Tower etc. Ry. Co.*, 105 Mo. 537, 16 S. W. 913. In that case the ordinance was held valid on the ground that the railroad company ⁶³⁸ obtained its right to use the streets of the city under a contract, by which it agreed to be governed by such ordinances as were in force, or might thereafter be enacted, for the regulation of such use. In this case the record shows no contractual relations between the city and the defendant railroad company, and for that reason the rule laid down in the *Fath* case cannot be applied in this. Whether the ordinance, in imposing upon drivers of street-cars a higher degree of care than that required by the rules of the common law, would be so unreasonable and oppressive as to render it invalid as a police regulation, we do not think it necessary to inquire in this case." There is nothing said in this case from which it can even be inferred that the doctrine announced in the *Fath* case was intended to be approved.

The same ordinance was again before this court in *Sanders v. Southern Electric Ry. Co.*, 147 Mo. 411, 48 S. W. 855, in

which the Fath case was followed. There is there cited in the opinion, as sustaining that view, the same cases referred to in the Fath case, and in addition thereto Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242, and St. Louis v. Connecticut etc. Life Ins. Co., 107 Mo. 92, 28 Am. St. Rep. 402, 17 S. W. 637, which were also actions for damages against abutting property holders for injuries alleged to have been sustained by the plaintiffs therein, by reason of the accumulation of ice and snow upon the sidewalks of the city which the owners of the adjoining property were required by ordinance to remove, and had failed to do so.

What is claimed to be the doctrine announced by the Fath case was again announced in Byington v. St. Louis R. R. Co., 147 Mo. 673, 49 S. W. 876, and Murphy v. Lindell Ry. Co., 153 Mo. 252, 54 S. W. 442, but in all of the authorities referred to in the Missouri cases as sustaining the rule announced in the Sanders case, not one of them, except that case, the Fath, Senn, Byington, and Murphy cases, was bottomed upon the violation of an ordinance which a city had the right to pass as a police regulation.

⁶³⁹ The city of West Plains had the power under its charter to abate nuisances and provide for the general welfare, and it was held in Bluedorn v. Missouri Pac. Ry. Co., 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103, that ordinances of cities regulating the speed of railroad trains are police regulations, and that the power to regulate them need not be given in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare.

The court said: "It is well to bear in mind that laws and ordinances regulating the speed of railroad trains are police regulations purely: Grube v. Missouri Pac. Ry. Co., 98 Mo. 330, 14 Am. St. Rep. 645, 11 S. W. 736; Knobloch v. Chicago etc. Ry. Co., 31 Minn. 402, 18 N. W. 106; Toledo etc. Ry. Co. v. Deacon, 63 Ill. 91; Thorpe v. Rutland etc. R. R. Co., 27 Vt. 140, 62 Am. Dec. 625. As said in the case last cited: 'This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.' Indeed, regulating the speed of railroad trains is one of the many instances of an exercise of the police power given by Chief Justice Redfield in that case. The delegation of such a power to a municipal corporation need not be given in express terms. Says Judge Dillon: 'Resulting from the power over streets, and to protect the safety of citizens and

their property, municipal corporations, in the absence of legislative restriction, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed': 2 Dillon on Municipal Corporations, 4th ed., sec. 713. Speaking of the power of a city to prohibit the propelling of cars by steam through a city, Redfield says: 'We should entertain no doubt of the right of the municipal authorities of a city or large town to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions': 2 Redfield on Railways, 5th ed., 578. In ⁶⁴⁰ Chicago etc. R. R. Co. v. Haggerty, 67 Ill. 113, objection was made to an ordinance limiting the rate of speed of trains within a town to not more than six miles per hour, on the ground that the town had no authority to pass it. The town had no express authority to regulate the speed of railroad trains, but the trustees had power to declare what should be considered a nuisance, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants might require. 'Under these powers,' says the court, 'we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens; and we view the ordinance in question as but a police regulation for the preservation of the safety of persons and property, the adoption of which was no more than a fair exercise of the police power vested in the town.'"

The same rule was announced in *Merz v. Missouri Pac. Ry. Co.*, 88 Mo. 672, and in *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645, 11 S. W. 736.

It was held in *Mason v. Shawneetown*, 77 Ill. 533, that where an incorporated city or town is vested by the legislature with power to pass ordinances, an ordinance enacted by the legislative branch of the corporation, in pursuance of such grant, and within the power conferred, has the force and effect of a law passed by the legislature, and cannot be regarded otherwise than a law of, and within, the corporation.

That case was followed with approval in the case of *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369.

The city of West Plains having the power to pass the ordinance in question, did a right of action accrue to plaintiff

thereon by reason of its violation and consequent death of her husband, if he was not guilty of negligence contributing thereto?

641 "The violation of a statute or ordinance regulating the speed of vehicles, horses, or trains . . . is such a breach of duty as may be made the foundation of an action by any person belonging to the class intended to be protected by such a regulation, provided he is specially injured thereby. . . . These principles apply, not only where the statute or ordinance declares that persons violating it shall be liable for any damage sustained by reason of its breach, but also where it contains no such provisions, and simply imposes a penalty by way of fine or otherwise, for disobedience": 1 Shearman and Redfield on Negligence, 5th ed., sec. 13.

Karle v. Kansas City etc. R. R. Co., 55 Mo. 476, was an action by plaintiff for damages for the death of her husband, whom she alleged was killed by the negligence of defendant in running its train within the city of St. Joseph, where the accident occurred, in violation of the ordinance of the city, and it was held that in so doing it was negligence per se, and that plaintiff was entitled to recover in the absence of evidence that her husband was guilty of contributory negligence.

Keim v. Union Ry. etc. Co., 90 Mo. 314, 2 S. W. 427, was the same kind of case, and the same rule was announced. So, also, were Neier v. Railroad Co., 12 Mo. App. 35; Eswin v. St. Louis etc. Ry. Co., 96 Mo. 290, 9 S. W. 577; Schlereth v. Missouri Pac. Ry. Co., 96 Mo. 509, 10 S. W. 66; Grube v. Missouri Pac. Ry. Co., 98 Mo. 330, 14 Am. St. Rep. 645, 11 S. W. 736; Kellny v. Missouri Pac. Ry. Co., 101 Mo. 67, 13 S. W. 806; Murray v. Missouri Pac. Ry. Co., 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817; Drain v. St. Louis etc. Ry. Co., 86 Mo. 574; Hanlon v. Missouri Pac. Ry. Co., 104 Mo. 381, 16 S. W. 233; Dickson v. Missouri Pac. Ry. Co., 104 Mo. 491, 16 S. W. 381; Gratiot v. Missouri etc. Ry. Co., 116 Mo. 450, 21 S. W. 1094; Prewitt v. Missouri etc. Ry. Co., 134 Mo. 615, 36 S. W. 667, in which Macfarlane, J., concurred.

In Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451, in which it was held that the plaintiff might maintain an action against the defendant for personal injuries sustained by reason of the blasting of rock by him in violation of an ordinance of the city in which the injury occurred, Judge Macfarlane ⁶⁴² wrote the opinion, as well, also, as in the case of Senn v. Southern Ry. Co., 108 Mo. 152, 18 S. W. 1007, and concurred in the opinion

in the case of *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103, thereafter decided at the same term, while Sherwood, J., who wrote the opinion in *Fath's* case, also wrote the opinion in *Schlereth's* case and concurred in the opinion in *Prewitt v. Missouri etc. Ry. Co.*, 134 Mo. 615, 36 S. W. 667, all of which, that is, *Schlereth v. Missouri Pac. Ry. Co.*, 96 Mo. 509, 10 S. W. 66, *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615, 18 S. W. 1103, and *Prewitt v. Missouri etc. Ry. Co.*, 134 Mo. 615, 36 S. W. 667, are adverse to what is claimed to be the rule announced in *Fath's* case, which clearly indicates that they did not intend to follow the rule announced in that case, even if it is as contended by defendant.

All of these decisions are in direct conflict, and irreconcilable with the rule announced in *Fath's* case, and subsequent cases in which it has been followed.

In *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, it was held that an individual who was injured by the engine and cars of a railroad company in consequence of its failure to observe the ordinances of a municipality while operating and running its trains therein might maintain an action against the company predicated upon the violation of the ordinance.

It is held by the supreme court of Georgia in *Western etc. Ry. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, 7 S. E. 912, and in *Central R. R. Co. v. Curtis*, 87 Ga. 416, 13 S. E. 757, that the violation of a city ordinance regulating the speed and management of railroad trains within the corporate limits of a city is negligence per se, and that a person sustaining injuries by reason thereof may maintain an action against the company for the damages sustained by reason of the violation of the ordinance. The same rule is announced in *Philadelphia etc. R. R. Co. v. Stebbing*, 62 Md. 504, and in 1 *Thompson on the Law of Negligence*, sec. 8, p. 505. To the same effect are *Correll v. Burlington etc. R. R.*, 38 Iowa, 120, 18 Am. Rep. 22; *Toledo etc. Ry. Co. v. Deacon*, 63 Ill. 91; *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Chicago etc. R. R. Co. v. Reidy*, 66 Ill. 45; *Terre Haute etc. R. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Piper v. ⁶⁴³Chicago etc. Ry. Co.*, 77 Wis. 247, 46 N. W. 165; *Houston etc. R. R. Co. v. Terry*, 42 Tex. 451.

It was upon the same principle that it was held in *Siemers v. Eisen*, 54 Cal. 418, that a person who was injured by a

runaway horse, left unfastened in the street of a city in violation of an ordinance of the city, might maintain an action on the ordinance against the person so leaving him for the injury sustained: See, also, *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; *Wright v. Railroad*, 27 Ill. App. 200.

Besides, the rule announced in *Karle v. Kansas City etc. Ry. Co.*, 55 Mo. 476, and subsequent cases, has been adhered to for over twenty-five years, and followed in subsequent cases by this court. A number of cases are now depending in this court which were brought in reliance upon those adjudications, and if the doctrine of *stare decisis* was ever invoked it does seem to me that it should be done in this case.

"It is held in New York and Pennsylvania that the violation of a statute or ordinance of this kind is not negligence as matter of law, but only 'some evidence of negligence'": 1 *Shearman and Redfield on Law of Negligence*, 5th ed., sec. 13; but the great weight of authority is the other way.

The violation of such ordinances being negligence per se, it logically follows that actions for damages for their violation may be based thereon.

No human agency, not designed for the purpose, is so destructive of life and property as locomotive engines and cars while running at a rapid rate of speed, and when authorized to do so by their charters, it is not only their right, but it is the duty, of cities and towns to pass such reasonable ordinances regulating the speed of trains of cars within their corporate limits, as may be necessary for their protection, and when passed such ordinances, being police regulations, have the same force and effect that legislative acts have, upon which actions for damages sustained by reason of their violation may be maintained even though the ⁶⁴⁴ railroad company against which the action may be brought never contracted to be responsible for such damages.

It follows from what has been said that the city of West Plains had the power to pass the ordinance, that it is valid, and that the petition states a cause of action.

Defendant also insists that there was no competent evidence tending to show a violation of the ordinance by those in charge of the train, or that any such violation was the cause of the accident. There was, we think, some evidence tending to show that at the time of the accident the train which caused the injury was running in excess of the rate of speed prescribed by the ordinance, and whether such violation was the cause of the injury or not was a question of fact to be determined by the

jury. And although deceased was a trespasser, it was defendant's duty not to negligently injure him.

A number of objections are made to the action of the court in admitting evidence on the part of plaintiff, but they seem to be rather technical, and certainly would not justify a reversal of the judgment upon that ground.

The first instruction given on the part of plaintiff is criticised upon several grounds, among which are that it ignored the contributory negligence of Jackson, and predicated plaintiff's right to recover altogether upon the negligence of defendant in running its train that caused the injury at a rate of speed in excess of that prescribed by ordinance, and because it did not inform the jury as to what lack of reason and understanding would excuse deceased from the effects of his own carelessness. The evidence did not, we think, warrant this instruction. While it showed that Jackson's mind and body were impaired by old age, it did not show that he was devoid of reason and understanding. It did, however, show that his mind was very much impaired, and that he could not remember localities, but this was far short of showing that he had no mind at all as implied by ⁶⁴⁵ the instruction, and the law required of him care and caution commensurate with his mental condition.

This instruction for these reasons is vicious, and should not have been given.

Plaintiff's second instruction is challenged upon the ground that it was a comment upon the evidence, in that it directed the jury to take into consideration the impaired condition of the mind and mental faculties of deceased in determining whether or not he was guilty of negligence, thereby giving undue importance to those facts. While the general rule is that an instruction should not single out particular facts, and thereby give undue importance to them, as the only excuse for the conduct of deceased in attempting to cross the track in front of the train was the want of capacity to see and to appreciate the danger in so doing, it was not prejudicial error, and the judgment should not be reversed upon that ground.

We are unable to see the force of the objection to plaintiff's third instruction, which is also challenged by defendant.

The first instruction asked by defendant should have been given, for even though defendant may have been running its train in violation of the ordinance, and in so doing have been guilty of negligence per se, still, before plaintiff was entitled to recover, it was necessary for her to show that the death of her

husband was caused by the excessive rate of speed of the train: Kelley v. Hannibal etc. R. R. Co., 75 Mo. 142; Bluedorn v. Missouri Pac. Ry. Co., 121 Mo. 258, 25 S. W. 943; Prewitt v. Missouri etc. Ry. Co., 134 Mo. 627, 36 S. W. 667.

We think that the second instruction asked by defendant should have been given as asked, for the engineer had the right to presume that Jackson was in the possession of all his senses, and possessed of sufficient intelligence to avoid danger, in the absence of evidence to the contrary, and if he was in a place of safety before he stepped upon the track, and when the engineer first discovered him, then the engineer ⁶⁴⁶ had the right to presume that he would not go onto the track in front of the approaching train, and while Jackson had the right to presume that defendant would not run its train through the city of West Plains in excess of the rate of speed prescribed by ordinance, the engineer was not required to make any effort to stop the train until he discovered that Jackson intended to or was starting to go upon the track; then it was his duty to use all reasonable means at his command, consistent with the safety of the train and its passengers, to avoid injuring him: Candee v. Kansas City etc. Ry. Co., 130 Mo. 151, 31 S. W. 1029; Maloy v. Wabash etc. Ry. Co., 84 Mo. 270; Boyd v. Wabash etc. Ry. Co., 105 Mo. 381, 16 S. W. 909.

In conclusion, we are unable to agree that plaintiff was guilty of any negligence contributing directly or indirectly to the death of her husband. They were poor, and she, although far advanced in years, was attending to her household duties, and after washing up her breakfast dishes, was temporarily absent at a grocery store in the city to get something for dinner, and during her absence, which was for a short space of time, her husband, whom she had left at home, left there, and went up the railroad track, and was killed, which she learned when she started to look for him after she got home.

While there was evidence tending to show that deceased was disposed to wander away from home, there was none showing that he was inclined to go to any particular place, or to places of danger. There was no negligence upon her part which should bar her recovery.

For these considerations we reverse the judgment without remanding the cause.

Gantt, P. J., concurs.

Sherwood, J., concurs in all that is said, with the exception of what is said in regard to the Fath case, from which he dissents.

RAILROADS—UNLAWFUL SPEED.—Though a person trespassing on a railway track is injured by a train running at a rate of speed forbidden by ordinance, he must, to entitle him to recover, prove that his injury was caused by the rate of speed, without contributory negligence on his own part: *Reidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507. See, too, *Southern Ry. Co. v. Prather*, 119 Ala. 588, 72 Am. St. Rep. 949, 24 South. 836.

RAILROADS—PERSONS ON TRACK.—An engineer who sees a person walking along or across the track in front of his engine has a right to assume that he is a reasonable person and will get out of the way of harm before the engine reaches him: *Deans v. Wilmington etc. R. R. Co.*, 107 N. C. 686, 22 Am. St. Rep. 902, 12 S. E. 77; *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680. See, too, *Mack v. South Bound R. R. Co.*, 52 S. O. 323, 68 Am. St. Rep. 913, 29 S. E. 905.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

COUNCIL BLUFFS SAVINGS BANK v. SMITH.

[59 Neb. 90, 80 N. W. 270.]

HOMESTEADS—ACKNOWLEDGMENT OF MORTGAGE.—The homestead of a married person cannot be encumbered by a mortgage not acknowledged by both husband and wife.

ACKNOWLEDGMENTS—IMPEACHMENT.—The certificate of an officer having authority to take acknowledgments cannot be impeached by showing that his duty was irregularly performed. Such certificate is, in the absence of fraud, conclusive in favor of those who in good faith rely upon it.

ACKNOWLEDGMENTS—CONCLUSIVENESS OF—MARRIED WOMEN.—If a married woman appears before a notary public for the purpose of acknowledging a deed or mortgage, and does in some manner attempt to do what the law requires to be done, the officer's certificate is, in the absence of fraud, conclusive of the facts therein stated as regards innocent purchasers.

W. E. Reed, for the appellants.

S. O. Campbell, J. Nichols, and Powers & Hays, for the appellee.

⁹⁰ SULLIVAN, J. This is an appeal from a judgment of the district court foreclosing two real estate mortgages. One of the appellants ⁹¹ is the wife of J. M. Smith, and the other is the wife of Albert V. Smith. J. M. and Albert V. were engaged in mercantile business in the city of Madison under the firm name of Smith Brothers. They became indebted in the sum of sixteen hundred and forty-six dollars and forty cents to the firm of Groneweg & Schoentgen, of Council Bluffs, Iowa; and on February 12, 1895, being requested to pay or secure the claim, promised, if their wives would join them, to

execute mortgages on their respective homesteads. Thereupon negotiable notes representing the indebtedness were signed by the Smiths, and two mortgages to secure the same were made out. Each mortgage covered the family homestead of one of the parties. The instruments were handed to S. O. Campbell, a notary public, who called next day on the appellants to secure their signatures and acknowledgments. It is conceded that appellants signed the mortgages when presented to them by the notary, but it is denied that there was any formal acknowledgment of either instrument. The evidence is somewhat conflicting, but the trial court was justified in finding, and we presume did find, that each of the appellants executed the mortgage on her homestead voluntarily, with knowledge of Campbell's official character, understanding the purpose for which he was present, and realizing fully the probable consequence of her act. That the plaintiff, the Council Bluffs Savings Bank, purchased the notes in good faith, before maturity, and became the assignee and owner of the mortgages was expressly admitted on the trial. It is claimed, and is doubtless true, that the appellants yielded reluctant consent to the giving of the mortgages; and it is possible that one of them was induced to consent because she believed her husband's statement that the creditors would take the property anyway. But however that may be, the fact remains that in the end the execution of each of the mortgages was a deliberate and voluntary act, the performance of which is authenticated in the manner required by law. About this there is no dispute. The action is not defended on the theory that the mortgages were made ⁹² and delivered under circumstances that would render them ineffective regardless of the homestead character of the mortgaged property.

The contention of appellants, as we understand it, is that there was in fact no conventional acknowledgment of the mortgages (no assent in legal form to the validity of the instruments), and that they are, therefore, void under the provisions of section 4, chapter 36, of the Compiled Statutes of 1897, which declares: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." It must, we think, be conceded that the evidence, if competent, is sufficient to show that neither of the appellants declared in terms to the notary that the execution of the mortgage was her voluntary act and deed. The cir-

cumstances seemed to indicate that the formality was altogether superfluous and might with propriety be waived. The conduct of the parties, and what they said at the time they executed the instruments, so clearly denoted their purpose that it naturally appeared to them and to the notary that a formal characterization of their acts was unnecessary. There is no pretense that the notary acted in bad faith, or that there was any artifice in his failure to observe the customary practice in taking acknowledgments. Undoubtedly, all parties to the transaction did what was believed to be necessary to make the mortgages valid liens upon the property therein described. The attempt to repudiate them is the result of an afterthought. On the established facts, it is quite clear that the notary's certificates cannot be impeached, and that the evidence offered to dispute the recitals of fact therein contained must be rejected. The general rule is, that the certificate of an officer having authority to take acknowledgments cannot be overthrown by showing that his duty was irregularly performed. He is the person designated by the statute to certify to the due execution of deeds, mortgages, and other instruments affecting ⁹³ the title to real property, and his official certificate, in regular form, is, in the absence of fraud, conclusive in favor of those who in good faith rely upon it. Any other rule would work incalculable mischief. It would open wide the door to fraud and perjury, and make recorded acknowledgments a snare to persons dealing with land on the faith and credit of the public records: See *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Lowell v. Wren*, 80 Ill. 238; *Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527; *Rollins v. Menager*, 22 W. Va. 461; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303; *Moore v. Fuller*, 6 Or. 272, 25 Am. Rep. 524; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Pool v. Chase*, 46 Tex. 207; *Jinwright v. Nelson*, 105 Ala. 399, 17 South. 91. "For reasons of public policy, and to protect innocent purchasers," say the supreme court of West Virginia, "it has been uniformly held that when a married woman appears before a justice of the peace for the purpose of acknowledging a deed, and does in some manner attempt to do what the law requires to be done, the certificate is conclusive of the facts therein stated as regards innocent purchasers": See *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932. In *Jones on Mortgages*, section 500, the rule is stated as follows: "As to statements of fact contained in a certificate of acknowl-

edgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." The question has been before this court in several cases. In *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. 235, it was held that "a certificate of acknowledgment of a deed or mortgage is prima facie correct and cannot be impeached except for fraud, collusion or imposition." In *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. 375, it is said that the formal attestation of an acknowledging officer can be overthrown "only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent." To the same effect is *Barker v. Avery*, 36 Neb. 599, 54 N. W. 989. It appearing in this case that there was what may be considered an irregular acknowledgment,⁹⁴ that the notary acted in good faith, and that the appellants intended by signing the mortgages in his presence to make them valid liens upon their homesteads, the conclusion is unavoidable that the judgment of the district court is right and must be affirmed.

ACKNOWLEDGMENT.—A MORTGAGE ON A HOMESTEAD is void if not acknowledged: *Havemeyer v. Dahn*, 48 Neb. 536, 58 Am. St. Rep. 706, 67 N. W. 489; or if not signed and acknowledged by the wife as required by statute: *Smith v. Pearce*, 85 Ala. 264, 7 Am. St. Rep. 44, 4 South. 616.

ACKNOWLEDGMENT.—ON THE CONCLUSIVENESS of certificates of acknowledgments, see the monographic note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150-159. If a married woman appears before an officer for the purpose of making an acknowledgment, and attempts to do in some manner what the law requires, the certificate is conclusive of the facts therein stated: *Pickens v. Knisely*, 20 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. 932. Compare *Wheelock v. Cavitt*, 91 Tex. 679, 66 Am. St. Rep. 920, 45 S. W. 796.

OMAHA BOTTLING COMPANY v. THEILER.

[59 Neb. 257, 80 N. W. 821.]

TRIAL—EVIDENCE—PLEADING.—Plaintiff must establish his case by a preponderance of evidence, and defendant cannot be deprived of his right to compel him to do so by an amendment of the petition after trial and verdict.

MASTER AND SERVANT—RISKS OF EMPLOYMENT.—INFANTS, like adults, assume the ordinary risks of the service in which they engage.

MASTER AND SERVANT.—INFANT EMPLOYEES are entitled to warnings of dangers which, on account of their youth and inexperience, they do not fully comprehend, and if such warning is not given, or if it be inadequate, the master is in fault, and must answer for the consequences.

MASTER AND SERVANT—MACHINERY AND APPLIANCES.—The measure of a master's duty to his servants is the care required by the usual and ordinary usage of the business, and he is not negligent in the conduct thereof if he uses such machinery and appliances as are in common and general use. Hence, if a servant, aware of the risks and dangers incident to the business thus conducted, sustains an injury, he is not entitled to recover, unless the master is otherwise negligent.

MASTER AND SERVANT—RISKS OF EMPLOYMENT—DUTY TO WARN OF.—If a servant, whether adult or minor, from the length and character of previous service and experience, may be presumed to know the ordinary risks attending the proper conduct of the business in which he is employed, he is not entitled, as an absolute right, to notice and warnings of the ordinary hazards and latent dangers attending the business. The master is required, under such circumstances, to do only what a prudent master would naturally do.

A. S. Ritchie, for the appellant.

T. J. Mahoney, for the appellee.

261 SULLIVAN, J. Michael Theiler, a minor, brought this action in the district court to recover damages of the Omaha Bottling Company on account of an injury to his right eye resulting from the explosion of a bottle filled with carbonated cider. The plaintiff, when injured, was in the service of the defendant, a corporation, engaged in the business of manufacturing soda water, mineral waters, "patent cider," and other aerated beverages. He was about twenty years of age at the time of the accident, and had worked for the company in its bottling department during the greater portion of the five preceding years. In 1894 he had charge and supervision of the business for nearly nine months. In 1895, after being out of defendant's service for a short time, he was employed as an ordinary hand, and was injured while bottling cider charged with car-

bonic acid gas under a pressure of eighty pounds to the square inch. In the original petition it was alleged as negligence that the defendant had failed to provide a suitable screen for the bottles which were being filled at the time of the explosion. After the verdict was returned the following amendment was added by leave of court: "That at said time plaintiff was inexperienced in the work of bottling said drink, and was uninstructed therein; that he was at said time using the appliances furnished by defendant in obedience to the requirements of defendant, and did not know, or have means of knowledge, of any danger in using said appliances, but believed the same reasonably safe, though as a matter of fact they were not, as defendant well knew." The action of the court in admitting this amendment by the postern gate was unwarranted and cannot be sustained. The case was submitted to the jury on the theory that the failure of the defendant to furnish the plaintiff with a proper screen for the cider bottles might, under the circumstances disclosed at the trial, constitute actionable negligence. The jury were, in substance, ²⁶² instructed that, unless contributory negligence was shown, they might find for the plaintiff, if the alleged negligence was established by a preponderance of the evidence. Was this instruction correct when considered with reference to the negligence charged in the amendment? Clearly not. The evidence bearing upon the question of contributory negligence was relevant, of course, to the matters stated in the amendment, and must have been considered by the jury in reaching their verdict; but the right to recover was not made to depend upon preponderant proof of any such matters. To make the amended petition the basis of the verdict would be to permit a recovery under instructions declaring, in effect, that all the essential facts of plaintiff's case need not be proved by the greater weight of the evidence. The general rule is that infants, like adults, assume the ordinary risks of the service in which they engage. They are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the consequence. But whether the plaintiff in this case, by reason of his youth or lack of experience, was ignorant of the danger to which he was exposed—whether the liability of cider bottles to explode under high pressure was as to him a secret and hidden peril—was for the jury to determine from the evidence, and, in accordance with the general rule, the burden of proving the

fact was upon the party asserting it: See *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Chicago etc. Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249, 29 N. E. 1106. The court, therefore, was not within the limits of judicial discretion in permitting the petition to be amended, and its order in the premises, being prejudicial to defendant's rights, is sufficient to require a reversal of the judgment.

Having shown that the verdict cannot properly rest on the facts introduced into the petition after the trial, we will now inquire whether the material averments of ²⁶³ the original pleading are supported by adequate proof. The evidence shows conclusively that screens for cider bottles were not in general use in factories like that of the defendant; that such bottles were expected to stand a pressure of one hundred pounds, and were considered entirely safe at a pressure not exceeding seventy-five pounds. The regular course of the business was to do the work with pressure ranging from forty to sixty pounds. The accident resulting in plaintiff's injury occurred when the gauge indicated a pressure of eighty pounds. This was an extraordinary condition. It was a condition which does not seem to have been anticipated, and one which would not have existed but for the negligence of the person whose duty it was to regulate the pressure. It would seem, therefore, that the proximate cause of the accident, the cause to which Theiler's misfortune is naturally and primarily referable, was the failure to properly regulate the pressure, and not the failure to provide a screen, which under ordinary conditions could serve no useful purpose. The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man. The appliances of the company were those in common and general use. Handled with ordinary care they were not dangerous. This being indisputably established, it follows that the negligence alleged in the original petition is without any foothold whatever in the proof: See *Chicago etc. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55; *Shadford v. Ann Arbor St. Ry. Co.*, 111 Mich. 390, 69 N. W. 661; *Sisco v. Lehigh etc. Ry. Co.*, 145 N. Y. 296, 39 N. E. 958; *Titus v. Bradford etc. Ry. Co.*, 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517; *Hosie v. Chicago etc. Ry. Co.*, 75 Iowa, 683, 9 Am. St. Rep. 518, 37 N. W. 963; *Hagan v. Chicago etc. Ry. Co.*, 86 Mich. 615, 49 N. W. 509.

There is another reason why the plaintiff is not entitled to recovery. The duty to warn him of latent dangers, if any there

were, was not an absolute one. The defendant was only required to do what a prudent master ²⁶⁴ naturally would do under like circumstances: See *Thain v. Old Colony Ry. Co.*, 161 Mass. 353, 37 N. E. 309; *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943. The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehension of a boy of average intelligence, nineteen or twenty years old, who had worked at the business for years, and had recently been charged with the control and supervision of the bottling department of defendant's establishment. It would, indeed, be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case. The plaintiff knew how the bottling business was conducted. He knew soda water and mineral water bottles would explode occasionally under an ordinary pressure; and it is scarcely possible that he was ignorant of the fact that cider bottles would also explode under high pressure. That he was ignorant of the hazards of the business we cannot believe; and to hold that the defendant should have warned him of such hazards would, in view of the circumstances, be requiring it to conform its conduct to an unreasonable standard of care. The judgment of the district court is reversed, and the cause remanded for further proceedings.

ASSUMPTION OF RISKS.—AN EMPLOYÉ of mature years and ordinary intelligence is presumed to know and assume the ordinary risks from machinery and appliances about which he is working: *Jones v. Manufacturing etc. Co.*, 92 Me. 565, 69 Am. St. Rep. 535, 43 Atl. 512.

AN INFANT SERVANT ASSUMES ALL RISKS ordinarily incident to the service: *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502. However, this rule is modified by the duty of the master to warn him of the perils of the work and instruct him how to avoid them: *Hayes v. Colchester Mills*, 69 Vt. 1, 60 Am. St. Rep. 915, 37 Atl. 269; *Addicks v. Christopher*, 62 N. J. L. 786, 72 Am. St. Rep. 687, 43 Atl. 196.

INFANT SERVANT.—IT IS THE DUTY OF AN EMPLOYER of an infant to explain fully to him the hazards and dangers connected with the business, and to instruct him how to avoid them: *Addicks v. Christopher*, 62 N. J. L. 786, 72 Am. St. Rep. 687, 43 Atl. 196.

MASTER AND SERVANT—SAFE APPLIANCES.—The duty of a master to his servant is to provide him reasonably safe and proper tools and apparatus with which to work, reasonably competent and careful coemployés, and a reasonably safe place to work: *Portance v. Lehigh etc. Co.*, 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; *Kent v. Yazoo etc. R. R. Co.*, 77 Miss. 494, 78 Am. St. Rep. 535, 27 South. 620.

BURR v. McCALLUM.

[59 Neb. 326, 80 N. W. 1040.]

REPLEVIN—MATTER IN ISSUE—DAMAGES.—In an action of replevin the inquiry is as to property in possession and wrongfully withheld at the time of the commencement of the suit, and there can be no recovery of damages for any property which the defendant did not have or control at such time.

TRIAL—INSTRUCTIONS—EVIDENCE.—The jury should be instructed to draw their conclusions from the evidence alone, and it is error not to so instruct, but it is a nondirection and not a misdirection, and if a party desires an instruction on this point, he must present it, and request that it be given. Otherwise, there is no ground for a reversal of the judgment.

J. McNeny, J. S. Gilham, and R. McNitt, for the appellant.

G. E. Chaney, D. H. Walden, and J. M. Chafin, for the appellee.

327 HARRISON, C. J. It appears that during a number of months prior to October 3, 1893, Ruth A. McCallum had in cribs belonging to plaintiff in error, in Guide Rock, this state, some "ear corn," and on or about the date mentioned the defendant in error, who was acting for Ruth A. McCallum, who was his mother, was informed by plaintiff in error that he desired the corn removed from the cribs, and he offered to aid in procuring another place to which the corn might be transferred and stored. The two saw one C. Trimble, who was in charge of an elevator in Guide Rock for I. A. Mason, of Hastings, Iowa, and made an arrangement that the corn be put into the elevator, there to be kept for an indefinite time at a charge for storage of one dollar per month. The corn was shelled and, pursuant to agreement, placed in the elevator, there being of it a trifle more than six hundred and fifty-three bushels. Mrs. McCallum died, and the defendant in error was appointed executor of her estate. This was subsequent to the commencement of this action, one of replevin to obtain possession of the corn, and there was a revivor of the action in the name of the executor. There was a jury trial of the issues, a verdict and judgment in favor of the executor, and the adverse party has removed the cause to this court for review. Errors are assigned of the giving by the court of certain instructions on its own motion, also of refusals to embody in the charge a requested instruction for plaintiff in error. It is also urged that the evidence was insufficient to sustain the special findings and verdict.

The evidence disclosed that when the corn was put into the elevator Trimble was in charge; also that, in the springtime of 1894, he was not actively conducting the elevator and grain business, but the plaintiff in error was then attending to it in Trimble's stead. When grain was purchased, a check was given on the local bank, to which ³²⁸ the name of I. A. Mason was signed by the plaintiff in error, and returns from sales of grain were credited in the bank to the account of I. A. Mason. At the time the corn was deposited in the elevator, the defendant in error knew that the elevator belonged to, and believed the business was being transacted for, I. A. Mason. The defendant in error testified that on April 3, 1894, he saw the plaintiff in error and asked him if the corn was then in the elevator, and was answered that it was. The defendant in error also testified that he further asked who was responsible to him for the corn, and the plaintiff in error replied that he was, and would then give a check for it, if the defendant in error desired it; and he then stated that he did not want the check if the corn was all right. He also testified that he did not then wish to sell the corn. About August 7, 1894, the defendant in error made a contract of sale of the corn to one Montgomery, but when the would-be purchaser went to the elevator to get the corn he could not "find it." Defendant in error further stated that he then went to the bank and inquired if "I. A. Mason had any money in the bank," and the answer was "No"; that he asked plaintiff in error where Mr. Trimble was, and was told he had gone away; that plaintiff in error also informed defendant in error there was no money in the bank. This was on August 13, 1894. This action was then commenced, and, after the sheriff had received the writ of replevin, he and defendant in error went to the elevator, but found it almost empty. It contained about fifty bushels of corn, of which possession was taken by the officer, and the same was delivered to the defendant in error.

It is insisted that the evidence was insufficient to sustain the verdict. In regard to the corn sought to be recovered in excess of what was discovered in the elevator, taken under the writ and delivered to the defendant in error, this contention must be sustained. It is clear from the evidence that no other corn was in the possession of the plaintiff in error, and no verdict or judgment against ³²⁹ him was warranted for corn other than he had under his control when this suit was commenced. It is the condition of things at the beginning of the suit which furnishes the ground of the action. It was not proved that the

plaintiff in error had, when this suit was brought, either actual or constructive possession or control of any corn other than the fifty or more bushels then in the elevator. There could be no recovery of damages for any corn which he did not have or control at the time of the institution of the suit: See *Heidiman-Benoist Saddlery Co. v. Schott*, 59 Neb. 20, 80 N. W. 47. Relative to the fifty or more bushels of corn found in the elevator and taken by the officer by virtue of the writ of replevin, there was sufficient proof to support a verdict against the plaintiff in error; that is to say, he was in possession of it and detained it from the defendant in error.

It is argued that no demand on plaintiff in error for the corn was shown. The testimony on this subject is not as clear and definite as in some cases, but there were facts which would warrant and sustain a conclusion that a demand, probably not in strict terms or so many words, was made for the corn and refused.

Objections are urged to the substance of the charge of the court on its own motion to the jury; also of its refusal to give certain instructions prepared and requested for plaintiff in error. To the extent those given and refused referred to the corn other than was discovered by the officer in the elevator the instructions given were defective, but relative to the corn which was taken there was in them no error which was prejudicial to the complainant, nor was there any prejudicial error in the refusal to read those proffered for plaintiff in error.

It is contended that the instructions, considered consecutively or as a whole, were erroneous, in that the jury was not directed that their findings must be from the evidence. It is true that the instructions did not by a general statement or direction, nor in any or each paragraph of the charge, require the findings to be from a consideration ³³⁰ of the evidence. A jury is sworn to a true verdict given according to the evidence, but there should be in the charge an injunction that their conclusions be drawn from the evidence, and it is error not to so instruct; but it is a nondirection and not a misdirection. If a party desires an instruction on this point, he must present it and request that it be given, or that it was not will not work a reversal of a judgment. There was no instruction asked on the point that the jury, in its deliberations and decisions, must be confined to and governed by the evidence, and the error is not available. The defendant in error may, within forty days, file a remittitur of the sum of three hundred and one dollars as of the date of

judgment. If this is done, the judgment, as thus reduced, is affirmed; if not done, the judgment is reversed, and the cause remanded.

Judgment accordingly.

IN REPLEVIN NO RECOVERY can be had for goods not in the possession of the defendant at the time the writ issues, except when such goods have been fraudulently disposed of or concealed to avoid the writ: *Reid etc. Co. v. Ferris*, 112 Mich. 693, 67 Am. St. Rep. 437, 71 N. W. 484.

BARR v. POST.

[59 Neb. 361, 80 N. W. 1041.]

JUDGMENTS—VACATING—FALSE TESTIMONY.—The intentional production by a litigant of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him.

JUDGMENTS — VACATING — FALSE TESTIMONY.—In an action to cancel a judgment, on the ground that it was obtained by fraud, and by perjured evidence, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that the judgment rendered was not attributable to his negligence and inaction. He is not justified in assuming that his adversary cannot produce evidence in support of his contention, and he must be ready to meet the issue.

Burr & Burr and Morning & Berge, for the appellant.

J. S. Kirkpatrick, T. Darnall, and Stewart & Munger, for the appellee.

³⁶² SULLIVAN, J. This action was instituted by William Barr to secure the cancellation of a judgment for damages recovered against him by Martha A. Post in the district court of Lancaster county. The issues having been decided in favor of the defendants, the plaintiff brings the record here for review by appeal. The question to be determined is the sufficiency of the evidence to sustain the decision. After a careful perusal of the record, we are entirely satisfied that the conclusion of the trial court is correct. The judgment assailed is based on an alleged assault and battery committed by Barr upon Mrs. Post. The reasons assigned for the annulment of the judgment are that it was procured by perjured testimony, and by a fraudulent concealment of material facts. It seems to be conceded that the general finding of the trial court in this case settles, in favor of appellees, the right of Mrs. Post to a judgment against appellant for some amount; but it is claimed that the jury, relying on false

testimony, were induced to award excessive damages. The false testimony, which appellant insists unjustly augmented the recovery, was given by Mrs. Post and related to the character and extent of her services at a public lunchroom ³⁶³ in the city of Lincoln, during a period of about five months after she was injured. Her testimony in the law case was to the effect that she did not do cooking or other heavy work, and that her services were intermittent. The evidence given on the trial of this cause shows that she acted both as a waitress and a cook, and that her services were continuous. We are committed by the case of *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151, to the doctrine that the intentional production by a litigant of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him. But actions of this character are not to be encouraged. Public policy demands that there shall be an end of litigation. A party is informed by the pleadings of the issue for trial, and he must be ready. He is not justified in assuming that his adversary will not produce evidence in support of his contention, whatever it may be. Barr was advised in the law action that Mrs. Post claimed to have been seriously injured, and he should have been prepared with his evidence to show that she was, soon after the alleged battery, engaged in manual labor that required for its performance good health and considerable physical strength. When, at the trial, he was informed where she had been employed, he should have consulted her employers, and called them as witnesses to disprove her claims. Whether the alleged false testimony would support an original action for a new trial, under any circumstances, we do not decide; but we have no hesitation whatever in saying that there is in this record no sufficient showing of diligence to entitle the plaintiff herein to the relief demanded. There is another reason why the judgment of the trial court must be affirmed. It does not appear that the jury, in estimating the damages, did not have ample evidence of unexceptionable witnesses before them. There is nothing to indicate that, laying the testimony of Mrs. Post entirely out of view, the damages are excessive, ³⁶⁴ or the judgment inequitable. The judgment of the district court is right, and is affirmed.

Norval, J., not sitting.

JUDGMENT, VACATING.—A judgment based upon perjured evidence of the successful party may be set aside in equity: *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151.

RICHARDSON v. SCOTT'S BLUFF COUNTY.

[59 Neb. 400, 81 N. W. 309.]

CONTRACTS FOR LOBBYING.—A contract by which a person agrees to draft a bill and have it introduced in the legislature, make arguments in its favor before legislative committees, and do all things useful and proper to secure its passage, his compensation to be liberal, but contingent upon the passage of the bill, is vicious, illegal, and void; and there can be no recovery under it, nor as upon an implied contract, nor upon a quantum meruit.

M. B. Reese, C. A. Robbins, F. I. Foss, and J. H. Broady, for the appellant.

M. J. Huffman, T. W. Morrow, and G. W. Heist, for the appellee.

402 HARRISON, C. J. There was filed in this action in the district court of Scott's Bluff county a petition, which was in part as follows: "The plaintiff complains of the defendant and alleges that on or before the first day of January, 1893, the plaintiff was a duly authorized attorney at law, and admitted to practice in the courts of the state of Nebraska, and as such attorney at law was engaged in the practice of her profession in accepting retainers, and prosecuting and defending such claims and cases as came within her employment as such attorney at law; that prior to said date and time, to wit, on or about the first day of September, 1889, a criminal action was tried in said county of Scott's Bluff, wherein the state of Nebraska prosecuted one George S. Arnold for the crime of murder in the first degree, and such proceedings were had therein as resulted in a conviction of said Arnold; that the whole costs of said prosecution and trial amounted to about the sum of \$7,016.01; that at said time the said county of Scott's Bluff had but recently been organized, and being compelled to pay said costs, the same became a heavy burden upon the people and taxpayers of said county, and the said county determined to make an attempt to obtain back the said expenses from the state by means of an appropriation by the legislature, and to do all things necessary or available to that result. Accordingly, thereupon, about the fourteenth day of January, 1893, two of the county commissioners of said Scott's Bluff county, being a majority of all the county commissioners of said Scott's Bluff county, for and on behalf of said county, orally employed this plaintiff to prepare a suitable appropriation bill appropriating and paying to the
403 said county sufficient funds from the treasury of the state

of Nebraska to reimburse the said Scott's Bluff county the money so paid out and expended by the said county, and to argue the merits of said bill before the proper legislative committees, and to do all things needful and proper to procure the passage thereof and the money sought, and agreed to pay plaintiff, on condition of success, a very liberal fee and compensation for said services. All of which plaintiff agreed to do. Thereupon, at the instance and request of a majority of the county commissioners of said county of Scott's Bluff, acting for and on behalf of said county, and in pursuance of the said agreement of employment, on or about the said sixteenth day of January, 1893, this plaintiff entered upon said employment, and went to the city of Lincoln, the capital of said state, where and when the legislature of the state of Nebraska was in session, and under and by virtue of said employment prepared and drafted said appropriation bill and appeared before the proper committees of the senate and house of representatives, and the various members of said bodies in public, and as attorney and agent of said county presented to said committees and members the merits, legality, and justice of said bill, and procured and caused the said bill to be passed, appropriating to said Scott's Bluff county for said purpose the sum of \$7,495.73, and which bill, known as 'House Roll 278,' became a law of said state April 6, 1893, and the said sum of money was duly appropriated to and for the use and benefit of said Scott's Bluff county. That at all said times the said Scott's Bluff county and the officers thereof had full knowledge and notice of the services of plaintiff and of her claim to remuneration therefor, and, so knowing of her said services and claim under the said contract, received and accepted the money so appropriated by said legislature to the said county; that the board of county commissioners of Scott's Bluff county, with the full knowledge of the said services of plaintiff and that by means thereof ⁴⁰⁴ the said appropriation was made, and of her said claim to remuneration, in session accepted and received said money so appropriated by the state as aforesaid, and all the fruits of plaintiff's services in the premises, and thereby ratified the agreement of employment between the members of the board of county commissioners for and in behalf of said county and the plaintiff as aforesaid, and the request of said two members of the board to this plaintiff to perform said services. The said board of county commissioners, in session as a board, have, with full knowledge of the services of the plaintiff in the premises, and that the receipt of said money from the state as aforesaid was

the fruit of plaintiff's services in the premises, without which the said money would not have been obtained by said county, appropriated and distributed to the use of said county all the said money received as aforesaid from the state; that in procuring the passage of said act and the appropriation of said money the plaintiff expended a large amount of time, to wit, about three months, and a large amount of money in the defraying of her expenses, and her services in connection therewith are of the value of \$1,500 and more; that plaintiff complied with all the conditions of said contract of employment on her part to be performed, but defendant wholly failed to comply with the conditions thereof on its part, and have paid plaintiff nothing thereon; that the sum of \$1,500 is justly due and owing to plaintiff from defendant, with interest thereon at the rate of seven per cent per annum from April 6, 1893."

In the answer there were admissions of the trial of the criminal case alleged in the petition, and that the costs were as stated in the petition; also, that a bill or act for the "relief of Scott's Bluff county" had been prepared. It was pleaded that it was done by "Hon. William Neville," and was introduced by a member of the house of representatives, and in the due course of legislation became a law, and by it there was appropriated to the purpose of the act the sum of \$7,495.73, which was afterward ⁴⁰⁵ received by the county. It was further pleaded in the answer:

"Defendant, further answering, alleges that after the passage and approval of the said bill as aforesaid, and before the said money had been paid by the state to the defendant, to wit, on the twentieth day of June, 1893, the plaintiff herein filed a pretended attorney's lien with the auditor of public accounts of the state of Nebraska, claiming the sum of \$1,500 as attorney's fees for procuring the passage of said bill through the legislature; that the treasurer of the defendant, the county of Scott's Bluff, was thereby compelled, in order to obtain said money, to sue out of the supreme court of the state of Nebraska a peremptory writ of mandamus at the cost of \$369.62 to defendant, directing the auditor to pay the said sum of money over to defendant; that afterward, on or about the twentieth day of June, 1894, plaintiff filed a claim against the defendant with the board of county commissioners of the county of Scott's Bluff, which claim was wholly disallowed, for the reason that defendant was not and is not indebted to plaintiff in any sum whatever, from which disallowance this appeal is taken.

"6. Defendant, further answering, denies that it ever at any time, or at any place, in any manner, by its board of county commissioners, or any part of said board, in session or out of session, or by any means whatever, acting for and on behalf of defendant, employed plaintiff, either orally or in writing, or any other way, to prepare said appropriation bill and present and argue the same before any of the committees of either house of said legislature on behalf of said defendant or any other purpose, and is not indebted to plaintiff in any sum whatever."

The reply was a denial of the new matter in the answer. A trial was had to the court, a jury being waived, and the defendant was given judgment. The plaintiff has prosecuted error to this court.

Evidence was introduced for plaintiff, but none on ⁴⁰⁶ part of defendant. The theory of the county in the trial court, gathered from the arguments in the brief filed, was and is now that there may have been some talk between the plaintiff and individuals of the county board with reference to a proposed application of the county to the state or the legislature for relief in the matter of the costs in the criminal case which was alluded to in the pleadings, but no negotiations or agreements with the board; that the plaintiff could not recover, for the reason the contract asserted by plaintiff was illegal and void, and the services rendered were in lobbying for the passage of the bill, and no recovery could be had for them. For the plaintiff it is argued, to the contrary, that the contract was made, was valid, and enforceable. If not properly made with the board, there was in effect a ratification by the board; and there was an acceptance of the services and fruits and benefits thereof, and the county must pay for the work done by plaintiff. The application to the legislature, as is disclosed by the petition, was not predicated upon matter of claim which had a legal basis. It was said in *State v. Moore*, 40 Neb. 854, 59 N. W. 755, in regard to this appropriation, that it was "in the nature of a donation"—"a gift in fact." In regard to the services to be performed by the plaintiff, as we have seen, the petition stated she was to do all things needful and proper to procure the passage of the bill, and her fee was to be a liberal one, contingent, however, and dependent upon her procuring the passage of the bill. The plaintiff testified as follows:

"Q. You are the plaintiff in this case? A. Yes, sir.

"Q. You may commence at the beginning and tell what took place between you and the commissioners with reference to

obtaining an appropriation from the legislature, and tell what occurred between you and the commissioners. A. In the spring or first of the year 1893, Elmer Morse, one of the board of commissioners, chairman of ⁴⁰⁷ the board of commissioners of Scott's Bluff county, I think he was, spoke to me about going to Lincoln, and asked me if I thought I could procure the passage of a reimbursing bill. I told him I thought I could, but asked why Mr. Huffman, the county attorney, could not go. He said he thought Mr. Huffman— (Defendant objects to what was said about Mr. Huffman. Overruled. Exception.) He said he wished me to go because Mr. Huffman said he would have no influence with an independent legislature, while, if I wanted to go, he thought I could get a bill through the legislature. We talked about the matter of fee. He desired that if I went down that my expenses should all be paid, and said that while he would hardly be willing to pay a fixed amount, I could have a very liberal percentage if I secured the passage of the bill. There was no amount agreed upon. The contract between him and myself was that I should have a very liberal fee.

“Q. What if you did not obtain any appropriation? A. I was not to receive anything. Mr. Decker agreed to the same thing.”

One of the county commissioners testified as follows:

“January, 1893, I made a verbal contract with the plaintiff, as an attorney and agent of Scott's Bluff county, Nebraska, to procure the passage of a bill by the legislature of Nebraska, for the purpose of reimbursing Scott's Bluff county for the expense incurred in the trial of one George S. Arnold for the crime of murder. Said plaintiff was to prepare said bill, procure its introduction to the legislature, to argue the merits of said bill as agent and attorney of said Scott's Bluff county, Nebraska, and to do whatever was necessary to secure the passage of said bill.

“Q. For what compensation was the plaintiff in this case to carry out this contract on her behalf? A. There was no specified sum mentioned. If the bill passed for only a part of the original sum sought, ⁴⁰⁸ she was not to receive as much; but in any event she was to receive a very liberal fee in the event of success, which fee to be proportioned to the amount secured. The plaintiff was to pay all expenses, the county not to be held liable for any expense or compensation in the event that no amount sought in the bill was secured. On account of plain-

tiff's taking the case conditionally, she was to receive a larger fee in case she succeeded in securing the passage of the bill mentioned than she would have received if Scott's Bluff county had guaranteed her expenses or a fee in any case."

A member of the senate at the time the appropriation bill referred to herein was passed testified as follows:

"Q. Do you know the amount of work and labor that Mrs. Richardson actually expended in the matter of procuring a favorable report from the committee of claims in the houses, and also the same committee in the senate, and in procuring the passage of said bill through both branches of the legislature? A. I know she was there when the session opened, and was there continuously until after the bill was passed and approved by the governor and became a law, as far as was necessary for the legislature and its approval was concerned, which was very near the close of the session, and that she worked continuously for that bill. I know that she went to every member of the senate time and time again in working for the bill, and I also know that the sentiment of the senate was against the bill until turned the other way by her."

A party who was a member of the house when the bill passed stated in testimony in this case:

"I myself with other members was asked to listen to her narrative of the case and circumstances very early in the session, I think the first week—and it continued until the passage of the bill, the date of which I don't remember, but it was very late in the session. She was constantly interviewing myself and other members of the house by urging us to look into the merits of the bill ⁴⁰⁹ and in advancing her arguments to show the merits of the case.

"Q. State if you remember any of the difficulties and adverse report that had to be overcome to get the bill through. A. Why, the committee on claims reported once, the first time that they reported, to allow one-half of the claim. She fought the report after it came back to the house and got it recommitted. The committee were not satisfied. The members of the committee expressed themselves dissatisfied with her refusal to take one-half of the claim, and finally reported it back to be indefinitely postponed. She then came upon the floor and mustered members enough to defeat it—the report for indefinite postponement—and had it ordered to the general file, and later she secured enough members to call it up out of its regular order, and considered it in open house, and finally secured the passage of the bill for the full amount asked.

"Q. Speaking from your experience as a legislator, what would you say about the efficiency of her work and the legality of her means employed? A. It was the shrewdest piece of work I ever saw done in the way of legislation, and the fact of her being a woman created a great deal of comment. She was the most persistent worker I ever saw, and the arguments she made both before the committee and the members individually were such as would have done credit to any attorney in the state."

In regard to contracts of the nature of the one which is herein asserted by plaintiff, it was stated in *Wood v. McCann*, 6 Dana, 366, quoted in *Cooley's Constitutional Limitations*, sixth edition, 163, 164, and in an article by Samuel Maxwell in 28 *American Law Review*, page 211, on the subject of "Necessity for the Suppression of Lobbying": "A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before the legislature or a committee thereof; but the ⁴¹⁰ law should not help him, or any other person, to a recompense for exercising any personal influence in any way in any act of legislation. It is certainly important to just and wise legislation, and therefore to the most essential interests of the public, that the legislature should be perfectly free from any extraneous influence which may either corrupt or deceive the members or any of them." The contract declared upon, and especially as shown by the evidence, was both specific and general in its terms relative to what was to be done by the plaintiff; and, moreover, it provided for a contingent fee—an indefinite sum, but a liberal one, if the act passed, nothing if it failed. The contract, if ever made, was vicious and illegal, and there could be no recovery under it, nor as upon an implied contract, nor upon a quantum meruit: See *Wood v. McCann*, 6 Dana, 366; *Marshall v. Baltimore etc. Ry. Co.*, 16 How. 314; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Harris v. Roof*, 10 Barb. 489; *Weed v. Black*, 2 McAr. 268, 29 Am. Rep. 618; *Chippewa etc. Ry. Co. v. Chicago etc. Ry. Co.*, 75 Wis. 224, 44 N. W. 17. It was decided in the cases just quoted that a contract, the nature of the one in suit, which provided for contingent fee or compensation is illegal and void, because such fee or compensation is a "direct and strong incentive to the exertion of not merely personal but sinister influence upon the legislature." It follows that the judgment of the district court must be affirmed.

LOBBYING CONTRACTS.—All agreements that tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action are contrary to sound morals, lead to inefficiency in the public service, and are void: *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 67 N. W. 715. A contract for a contingent fee to be paid on the passage of a legislative act is void: See the monographic note to *Parsons v. Trask*, 66 Am. Dec. 507.

PAXTON v. STATE

[59 Neb. 460, 81 N. W. 383.]

APPELLATE PRACTICE—DIRECTING VERDICT.—If a verdict is rendered in obedience to a peremptory instruction from the trial court, it is the duty of the appellate court, in reviewing the questions presented for decision, to assume every material fact which the evidence for the complaining party establishes or tends to prove.

OFFICIAL BONDS ARE WITHOUT VALIDITY until delivered.

OFFICIAL BONDS—ACCEPTANCE BY GOVERNOR.—The governor of the state has no authority, as its agent, to accept the official bonds of state or district officers, and thereby give them validity as a contract. His sole duty is to approve them.

OFFICIAL BONDS—NECESSITY OF FILING.—The official bonds of state and district officers do not become binding obligations until they have been filed in the office of the secretary of state.

INSTRUMENTS ARE NOT DELIVERED until they have passed beyond the dominion, control, and authority of the makers, and are no longer capable of being recalled. Such delivery is essential to the validity of an official bond, and until so delivered it is not a binding contract.

OFFICIAL BONDS.—MERE APPROVAL of official bonds does not work their acceptance, nor make them valid contracts.

OFFICIAL BONDS—AGENCY TO DELIVER.—The principal in an official bond has an implied agency to deliver it as the contract of his sureties.

OFFICIAL BONDS.—POSSESSION BY THE PRINCIPAL of an official bond on a day subsequent to that fixed by statute for its delivery carries with it prima facie the right to have it approved and delivered.

OFFICIAL BONDS—RIGHT OF SURETY TO REVOKE.—Sureties on an official bond have the right to revoke their principal's authority to bind them at any time before the bond is delivered, but without such revocation the right of the principal to deliver the bond and bind them continues. Until the sureties are accepted they are at liberty to recede, but until they have signified an intention to do so, the state may bind them by accepting their bond.

OFFICIAL BONDS—ADDITIONAL SURETIES.—No state officer has authority to demand additional sureties of another state officer after his official bond has been duly approved and filed of

record, and sureties signing under such circumstances are not bound.

OFFICIAL BONDS—FAILURE TO FILE IN TIME.—The failure of an officer to have his official bond approved and filed within the time fixed by statute creates a vacancy in the office to which he has been elected or appointed; but in such case the state may waive its right to oust the incumbent and elect to deal with him as entitled to the office.

OFFICIAL BONDS — FAILURE TO FILE IN TIME — WAIVER OF OUSTER—ESTOPPEL AGAINST SURETIES.—If an official bond, with the express and implied authority of the sureties, is approved and delivered, after the right to declare a forfeiture of the office has occurred because such bond was not filed in time, such sureties are estopped to deny the validity of the bond, on the ground that it was not filed within the time fixed by law.

TROVER AND CONVERSION—JOINT TORT FEASORS.—If two or more persons have converted the property of another, the latter may sue them either jointly or severally, and a court of equity will not compel him to pursue one of them rather than the other, who is equally guilty.

OFFICIAL BONDS—LIABILITY OF SURETIES—STATEMENT BY ACCOUNTING OFFICER AS EVIDENCE.—A document containing an accounting made by an officer and used by him in turning over his office to his successor as required by law is competent evidence against the sureties on the official bond of the former officer.

EVIDENCE—BOOK ENTRIES.—An officer who has held a certain office for a considerable time is presumably competent to give an opinion as to the meaning of entries in books evidencing business transactions in his office.

OFFICIAL BONDS — ACCOUNTING — LIABILITY OF SURETIES.—An officer who, in accounting to himself as his own successor, turns over bank credits, afterward entered as cash receipts on the books of his office, prima facie relieves the bondsmen for his first term from liability, and charges his bondsmen for his second term with the amount of such credits.

CERTIFICATES OF DEPOSIT—RIGHTS OF HOLDER.—The owner of a certificate of deposit or other evidence of money in the custody of a solvent bank is as effectually invested with the control and dominion of such money as though there had been a manual delivery thereof to him.

OFFICIAL BONDS—OFFICIAL RECORDS AS EVIDENCE AGAINST SURETIES.—The records of a public officer kept by the incumbent of such office are competent evidence against his sureties, and, in the absence of countervailing proof, are conclusive.

PUBLIC OFFICERS—PRESUMPTION.—A public officer is presumed to faithfully perform the duties with which he is charged.

PUBLIC OFFICERS—CONVERSION—EVIDENCE.—In an action for the specific conversion of public money against an officer and his sureties, evidence tending to show that such officer paid his own funds into the public treasury is not admissible unless it appears that the alleged conversion occurred prior to such payment. Such payment does not answer evidence of a defalcation furnished by the official records.

PUBLIC OFFICERS—DECLARATIONS AS EVIDENCE.—Public corporations act through their officers and agents, and the declarations of the latter, when made during the transaction of of-

ficial business, and in relation thereto, are admissible in evidence as part of the *res gestae*.

EVIDENCE.—PLEADINGS IN ONE SUIT are admissible in evidence in another suit when offered as admissions or declarations against interest, but when such pleadings are not signed or verified by the party himself, they can be received only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterward sanctioned by him.

J. C. Cowin, F. T. Ransom, R. Ryan, and F. Irvine, for the appellant.

C. J. Smyth, attorney general, W. D. Oldham, deputy attorney general, and E. P. Smith, for the state.

⁴⁶⁷ **SULLIVAN, J.** At the general election in 1894 Joseph S. Bartley was elected to the office of state treasurer, as his own successor. On January 3, 1895, he took the oath required by law, and tendered his official bond to the governor for approval. The sureties whose names then appeared upon the obligation were Nathan S. Harwood, F. M. Cook, A. B. Clark, John H. Ames, Charles A. Hanna, Mary Fitzgerald, C. C. McNish, and E. E. Brown. The governor did not approve the bond on the day it was presented, but returned it to Bartley, who promised to strengthen it by procuring additional sureties. On January 9, 1895, the bond was again presented for approval with the names of Thomas Swobe, Cadet Taylor, and W. A. Paxton added to the names of the original obligors. It was thereupon approved, and on the same day filed for record and recorded in the office of the secretary of state. Bartley, at the end of his second term, was found to be a defaulter, and this action was instituted in behalf of the state to recover of the defendants, as his sureties, the amount of the defalcation. The cause was tried to a jury in the district court of Douglas county, and resulted in a verdict and judgment against all the defendants except Mary Fitzgerald, who succeeded in establishing the defense of incapacity to contract at the time ⁴⁶⁸ her signature was obtained. The verdict against the sureties who are here complaining was rendered in obedience to a peremptory instruction from the trial court; and it becomes, therefore, our duty, in examining the questions presented for decision, to assume the existence of every material fact which the evidence for the defendants establishes or tends to prove.

The original sureties contend that they are not bound, because the bond was not accepted and approved on or before January 3d, which was the first Thursday after the first Tues-

day in that month. Brown further insists that the additional sureties signed without his consent, and that he thereby became released from his obligation. Paxton, Swobe, and Taylor claim that the bond was already effective when their signatures were obtained, and that their undertaking is void for want of a consideration to support it. We will consider these defenses together. The petition alleges that the bond was delivered to the governor on January 3d, and on that day filed for record in the office of the secretary of state. It is also alleged that the bond was afterward returned to Bartley to obtain the signatures of additional sureties, and that on January 9th it was again handed to the governor, who then approved it and filed it with the secretary of state. These averments of the petition are traversed, and, after a careful examination of the record, we quite agree with the statements of counsel for the defendants that the evidence conclusively shows that the bond was not filed in the office of the secretary of state until January 9th. Prior to that date no contract relations existed between the state and any of the defendants herein growing out of the signing of the bond in suit. A bond, like a deed, is without validity until it has been delivered. Without delivery it is void: See *United States etc. Pump Co. v. Drexel*, 53 Neb. 771, 74 N. W. 317; *Duer v. James*, 42 Md. 492; *Donnelly v. Rafferty*, 172 Pa. St. 587, 33 Atl. 754; *Fay v. Richardson*, 7 Pick. 91. As we understand the law, the governor was not the agent of the state to ⁴⁶⁹ accept the treasurer's bond. His duty was to approve it merely. He was not authorized to accept it on behalf of the state, and thereby give it vitality as a contract. By section 5 of chapter 10 of the Compiled Statutes of 1899, it is provided that all official bonds of officers chosen at a general election shall be filed in the proper office on or before the first Thursday after the first Tuesday in January next succeeding the election. Section 6 of the same act declares that the official bonds of all state and district officers, except the governor, shall be approved by the governor, and be filed and recorded in the office of the secretary of state. The governor's bond must be approved by the chief justice of the supreme court. Section 15 declares the consequence of a noncompliance with the requirements of the act. It is as follows: "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon ipso facto become vacant, and such vacancy shall thereupon

immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office." It seems entirely clear from the statutory provisions quoted and referred to that the official bond of the state treasurer does not become a binding obligation before it has been filed with the secretary of state. Section 15, in plain terms, declares that a public office shall become vacant if the person chosen to fill it neglects to have his official bond filed in the proper office within the proper time. This certainly implies that the bond shall be returned, after its approval, to the person presenting it, so that he may do the further act which is, under the law, indispensable to the completion of his title to the office. His right to the possession of the bond after its approval necessarily includes the right to file it or not, as he may think best, and precludes, of course, the idea of a prior delivery. An instrument is not delivered until it has passed beyond the dominion of the maker, and is ⁴⁷⁰ no longer capable of being recalled. If it be still under his control, and subject to his authority, it is not a binding contract: See *Duer v. James*, 42 Md. 492; *Fisher v. Hall*, 41 N. Y. 416; *Younge v. Guilbeau*, 3 Wall. 636. It was competent for the executive, under the provisions of chapter 10, *supra*, to approve the treasurer's bond, but it was not within his power to vitalize it by acceptance; that function belonged exclusively to the secretary of state. "The law," as was said in *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681, "contemplates that the officer will have the bond approved, afterward filed and recorded. If he secured its approval, and did not file or deliver it, it would be no more binding because of the approval than it would without it. The approval does not work the acceptance of the bond."

Having reached the conclusion that Mr. Bartley's bond was still in his hands and subject to his control on January 9th, we will inquire whether he had, on that day, authority to deal with it so as to make it a binding contract between the sureties and the state. It is, we believe, a doctrine of universal recognition that the principal in an official bond has an implied agency to deliver it as the contract of his sureties. They intrust it to him for that purpose: See *Pequawkett Bridge v. Mathes*, 8 N. H. 139; *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, 32 Pac. 538. The obligation in suit was given by all the sureties to Bartley, to be by him presented for approval and filed in the office of the secretary of state. There is nothing in the record

to indicate that any of the sureties signed conditionally, or that there was any actual limitation upon Bartley's implied authority to use the bond in furtherance of the purpose for which it was signed. Possession of the bond on January 9th carried with it, *prima facie*, the right to have it approved and delivered: See *Sampson v. Barnard*, 98 Mass. 359; *State v. Rhoades*, 6 Nev. 352. The sureties had the right to revoke their principal's authority at any time before the bond was delivered; but without such ⁴⁷¹ revocation the right to deliver continued, and, as we have said, possession of the instrument was evidence of the right. Until the sureties were accepted, they were at liberty to recede; but until they signified an intention to recede, the state might bind them by accepting their offer to answer for the official misconduct of their principal: See *State v. Dunn*, 11 La. Ann. 550. There is in this record an entire absence of evidence from which it might be justly inferred that the delivery of the bond in its final form was in fact unauthorized. The only evidence bearing upon this point clearly indicates that the original sureties desired that the bond should be approved after January 3d, strengthened by such additional sureties as Bartley might be able to procure. Between January 3d and the time when the bond was approved they signed a paper, referred to in the bill of exceptions as Exhibit 2e, reciting that "each, having signed the bond of Joseph S. Bartley as state treasurer of the state of Nebraska, do hereby consent and agree that any and all additional names that he may procure on said bond shall in no manner affect our liability on said bond, and that each of us are held liable the same as if said names had not been added. Jan. —, 1895." This document affords, we think, but one rational inference, *viz.*, that Bartley's bond had not been approved or filed within the time appointed by the statute. No officer of the state is authorized to demand additional sureties of the state treasurer after his official bond has been duly approved and filed for record. Sureties signing under such circumstances are not bound, there being no consideration for their promise: See *Stoner v. Keith County*, 48 Neb. 279, 67 N. W. 311. This being so, the original sureties must have signed Exhibit 2e knowing, or at least believing, that their bond had not yet become effective. The sole motive for giving the bond was to establish Bartley in the office of treasurer; and, if that end had already been accomplished, the procurement of additional sureties would have been an idle ceremony—a vain and useless act. ⁴⁷² When Bartley presented

his bond, accompanied by Exhibit 2e, on January 9th, he was undoubtedly acting within the scope of an apparent authority from all his sureties to have the obligation approved and delivered; and we think the evidence conclusively shows that his apparent authority and his real authority were identical.

It is true that Bartley's right to act as treasurer became extinguished upon his failure to have his bond filed and approved on or before January 3d: See Comp. Stats. 1899, c. 10, sec. 15; *State v. Lansing*, 46 Neb. 514, 64 N. W. 1104. The state might, on or after January 4th, appoint another person to fill the office, but it was not bound to do so. It might waive its right to oust Bartley, and elect to deal with him in the character which he assumed. Section 15 of the law in relation to official bonds was enacted for the protection of the public, and not for the benefit of sureties; and they, consequently, cannot be heard to object that approval and acceptance were not within the prescribed time: See *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *Ashkum v. Lake*, 12 Ill. App. 25; *Monteith v. Commonwealth*, 15 Gratt. 172; *State v. Rhoades*, 6 Nev. 352. The bond in suit was, with the implied and express authority of the sureties, approved and delivered after the forfeiture occurred. The state accepted it, relied on it, and was induced by it to waive its right to exclude Bartley from the office of treasurer. The right to the office was claimed by virtue of an election. The bond so states; and the bondsmen cannot be permitted to escape liability by denying now the existence of a right which in behalf of their principal they successfully asserted on January 9, 1895: See *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *Blaco v. State*, 58 Neb. 557, 78 N. W. 1056; *State v. Rhoades*, 6 Nev. 352; *Monteith v. Commonwealth*, 15 Gratt. 172; *Chandler v. State*, 1 Lea, 296; *Olean v. King*, 116 N. Y. 355, 22 N. E. 559; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Waters v. State*, 1 Gill, 302; *Commonwealth v. Philadelphia*, 27 Pa. St. 497; *Middleton v. State*, 120 Ind. 166, 22 N. E. 123; *Mayor v. Harrison*, 30 N. J. 473 L. 73; *Ferguson v. Landram*, 5 Bush, 237, 96 Am. Dec. 350; *Mississippi County v. Jackson*, 51 Mo. 23; *Police Jury v. Brookshier*, 31 La. Ann. 736.

Having disposed of the main question, we will now turn our attention to some other assignments of error upon which a reversal of the judgment is claimed. The petition charges that on January 2, 1897, Bartley transferred to the Omaha National Bank, in payment of a void warrant held by it, two hundred

and one thousand eight hundred and eighty-four dollars and five cents of the money of the state, and that such transfer amounted to a conversion. Some days before the trial the defendants asked leave to file an amended and supplemental answer, setting forth that the transferee of the fund and holder of the warrant was a state depository, and as such had in its custody, at the time of the transfer, the money alleged to have been converted. The court denied the application, and this ruling is assigned for error. The claim of the defendants is that the depository bank is primarily liable for the loss of the money paid upon the warrant; that it and its sureties should have been brought into court and charged with the amount of the unauthorized payment; and that Bartley's sureties should, as to this amount, have been entirely exonerated, or charged, at most, with a secondary liability. The legal effect of the transaction in question, according to the former decisions of this court, was to render both Bartley and the bank liable to the state as joint tort feasons: See *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; on rehearing, 55 Neb. 294, 75 N. W. 832; *State v. Bartley*, 56 Neb. 810, 77 N. W. 438; *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N. W. 319. The evidence in this case relating to that transaction is, in its essential features, the same as that given in the cases cited, and, therefore, according to a familiar doctrine of the law of torts, the state was at liberty to sue either or both of the joint wrongdoers: See *Kellow v. Central etc. Ry. Co.*, 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 466; *Johnson v. Chicago etc. Ry. Co.*, 31 Minn. 57, 16 N. W. 488; *Pollett v. Long*, 56 N. Y. 200; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Boyd v. Insurance Patrol*, 113 Pa. St. 269, 6 Atl. 536. The cases cited in 474 support of the application to amend do not go to the extent of holding that equity will, under any circumstances, deprive a party of the right of election, and compel him to pursue one wrongdoer rather than another who is equally culpable. The state has in this case chosen to proceed against Bartley for a tortious act amounting to official misconduct; and it has a right to insist that his bondsmen shall perform their contract by making good the loss sustained by the public.

Error is assigned on the admission in evidence of Exhibit 23 tendered by the state for the purpose of showing the balance with which Bartley was chargeable at the end of his second term. This exhibit is a statement prepared by the auditor of public accounts and purports to show the moneys and securities

for which Bartley, as treasurer, was accountable to his successor on January 7, 1897. It was produced by Bartley and handed to his successor, J. B. Meserve, in the office of the treasurer on the morning of January 8th, at the time the office was being turned over, and in connection with the accounting which was then being made by the outgoing to the incoming treasurer. It was, in substance, a declaration by Bartley, while in the act of accounting, that the amounts mentioned in the document were the amounts for which he should account. It was the duty of Bartley to account to his successor, and to turn over all moneys and securities with which he was chargeable. The sureties contracted that this should be done. It was an official duty, the performance of which was necessary to their exoneration. The accounting was made at the very time the law required it to be made; and we therefore think that, although Bartley had ceased to be the *de jure* treasurer by reason of Meserve's having qualified, his declaration as to the amount of moneys and securities which he should turn over to his successor was admissible as evidence against the sureties. It was a declaration made during the transaction of business, for which they were liable and so became part of the *res gestae*: See 1 Greenleaf ⁴⁷⁵ on Evidence, 12th ed., sec. 187; Brandt on Suretyship and Guaranty, 1st ed., sec. 518; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 64 Am. St. Rep. 475, 71 N. W. 261; Stetson v. City Bank of New Orleans, 2 Ohio St. 167. But, if we are mistaken in our conclusion upon this point, the admission in evidence of Exhibit 23 would not be reversible error, because the correctness of the balance shown by the paper is conclusively established by other competent proof. Mr. Meserve was called as a witness for the state, and permitted, over objection, to explain the meaning of certain entries in the books kept by Bartley as treasurer. The objection to the evidence is that the books speak for themselves, and that the witness was not shown to possess the qualifications of an expert. There was no error in the ruling. While it is true the books speak for themselves, their meaning is not apparent at once to the average juror. Mr. Meserve had, at the time of the trial, been state treasurer for more than two years, and was, therefore, presumably competent to give an opinion as to the meaning of entries evidencing business transactions in the treasurer's office.

A further contention of the defendants is that the court held them liable for a defalcation which occurred during Bartley's

first term. This claim is based on the fact that Bartley, at the beginning of his second term, turned over to himself, as his own successor, a large amount of bank credits in lieu of actual cash. It is indisputably established that, in the accounting between the treasurer and the governor on January 8, 1895, Bartley produced what purported to be bank drafts, certificates of deposit, and other vouchers for money in bank, and that these credits were considered and accepted as the equivalents of money, which they were supposed to represent. The attorney general insists that this transaction exonerated the first sureties and charged the second; and, we think, in view of the evidence, his position is tenable. The defendant sureties are, of course, liable only for moneys received by their principal during the second term; their contract does not bind them to answer for securities ⁴⁷⁶ which the treasurer was not authorized to accept in payment of obligations due to the state. But if the transfer of the bank credits in question was, in substance, a transfer of cash, the sureties are liable. The owner of a certificate of deposit, or other evidence of money in the custody of a solvent bank, is as effectually invested with control and dominion of such money as though there had been a manual delivery of it to him. Such is the doctrine of the later decisions of this court: See *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023. Whatever uncertainty there may be as to the position of the court upon other questions considered in the *Hill* case, there is no doubt upon this point. Two of the judges and the three commissioners concurred in this statement of the law: "A state treasurer who, on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment, and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank": See *State v. Hill*, 47 Neb. 456, 66 N. W. 541. In the *Bush* case (*Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023) the question was again presented, and the court, in an opinion by the chief justice, held that the transfer of a credit in a solvent bank is a transfer of money within the meaning of the law. That the bank credits transferred by Bartley to himself represented money in solvent banks is shown by the en-

tries in the books of the treasurer's office. These records show that on January 31, 1895, Bartley had on hand, as cash, the money represented by the bank vouchers turned over on January 8th. Other records subsequently made by Bartley as treasurer testify to the same fact. These records are competent evidence against the sureties; and, in the absence of countervailing proof, would be conclusive: See *Van Sickel v. Buffalo County*, 13 Neb. 103, 42 Am. Rep. 753, 13 N. W. 19; *Albertson v. State*, 477 9 Neb. 429, 2 N. W. 742, 892; *Ohio etc. Ry. Co. v. People*, 119 Ill. 207, 10 N. E. 545; *Pike v. People*, 84 Ill. 80; *Rizer v. Callen*, 27 Kan. 339; *Locke v. Bennett*, 7 Cush. 445; *Union v. Bermes*, 44 N. J. L. 269, 43 Am. Rep. 369. That Bartley had, during his first term, entered these same bank credits on his books as cash indicates nothing more, we think, than that they were considered and treated as money subject to his dominion and under his control. We cannot presume that the records are false, but must, on the contrary, indulge the presumption that the treasurer performed faithfully the duties with which he was charged: See *Hastings School Dist. v. Caldwell*, 16 Neb. 68, 19 N. W. 634; *Taylor v. Wilson*, 17 Neb. 88, 22 N. W. 119; *Green v. Barker*, 47 Neb. 934, 66 N. W. 1032; *Blaco v. State*, 58 Neb. 557, 78 N. W. 1056.

Another assignment of error relates to the rulings of the court excluding the proffered testimony of the witness Balch, and the books of the Omaha National Bank in connection therewith. By this witness, and the books of the bank of which he was assistant cashier, the defendants proposed to show that the warrant, for the payment of which Bartley, as treasurer, drew his check for two hundred and one thousand eight hundred and eighty-four dollars and five cents on January 2, 1897, had been previously sold by him and the proceeds of the sale turned over to the state, or paid out for its use and benefit. We are entirely satisfied that the rejection of this evidence was not error. The books of the treasurer's office are presumably a true record of the receipts and disbursements of the public revenues. It cannot be assumed, without proof, that Bartley, in violation of his duty, charged himself with moneys which did not belong to the state. The rejected evidence does not go to the extent of showing that condition of affairs; and it had, therefore, no tendency to disprove the shortage disclosed by the state's evidence. There being, at the time it is claimed the proceeds of the warrant were paid to the state, no proof of any defalcation during the second term, it is clear the

evidence in question was inadmissible, except on the theory that Bartley had been charged, as treasurer, with moneys ⁴⁷⁸ which in fact belonged to himself. Had the defendants offered to prove that he was so charged, and that the apparent shortage was the result of false entries in the treasurer's books, we think the evidence would have been admissible, even under a general denial, since the action is only in part for the conversion of a specific fund. But the defendants could not defeat a recovery, or break down the plaintiff's case, merely by showing that there had been, at different times, a wrongful commingling of Bartley's money with the money of the state. That fact would not answer the evidence of a defalcation furnished by the official records.

It is finally contended that the court erred in directing the jury to find in favor of the plaintiff for the full amount claimed in the petition. This contention must be sustained. There was conflicting evidence that should have been submitted to the jury. The action proceeded on the theory that Bartley had fully accounted for the treasury balance with which he was chargeable at the end of his first term. To prove that he had not so accounted, the defendants gave in evidence a transcript of a record of the district court of Lancaster county showing the institution and pendency of a suit brought, in behalf of the state, by the attorney general on his own motion, and, at the request of the governor, to recover of the first term bondsmen an alleged shortage of three hundred and thirty-five thousand dollars. The petition was verified by the attorney general on information and belief, but, according to his testimony, without any personal knowledge of the facts. The bringing of the action in Lancaster county was, in effect, a declaration by the state that Bartley had not accounted for the moneys received by him, as treasurer, during his first term. Public corporations are compelled to act through their officers and agents, and the declarations of such officers and agents, when made during the transaction of official business and in relation thereto, are admissible in evidence as part of the *res gestae*: See *Gray v. Rollinsford*, 58 N. H. 253; *Chicago v. Greer*, 9 Wall. ⁴⁷⁹ 726; *Sharon v. Salisbury*, 29 Conn. 113, 1 Am. & Eng. Ency. of Law, 2d ed., 691. The pleadings, under the reformed system of procedure, "are the written statements, by the parties, of the facts constituting their respective claims and defenses": Code Civ. Proc., sec. 89; they are not, as formerly, the mere flourishes of the draughtsman; and the prac-

tice, therefore, is to receive them in evidence in other suits when offered as admissions or declarations against interest: See *Bunz v. Cornelius*, 19 Neb. 107, 26 N. W. 621; *Miller v. Nicodemus*, 58 Neb. 352, 78 N. W. 618; *Ludwig v. Blaskshere*, 102 Iowa, 366, 71 N. W. 356; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872. When not signed or verified by the party himself, they are received only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterward sanctioned by him: See *Ayers v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. 129. Being the admissions of the party against whom they are offered, or else the admissions of an agent having authority to make them, they possess evidential value; they afforded some probability of the existence of the facts admitted. In this case the question does not arise whether a particular admission in a pleading was made with the suitor's authority, or permitted to stand with his approval. The broad question is whether the institution of the suit in Lancaster county is evidence against the state that a right of action existed. We think it is. The attorney general had express statutory authority to sue the first term bondsmen, and the governor had like authority to direct such a suit to be brought: See *Comp. Stats. 1899*, c. 83, art. 5. Manifestly, then, the bringing of the action was a declaration by the state that a defalcation had occurred during Bartley's first term. It implied, logically, that either the attorney general or the governor, or both, had made an investigation into the treasurer's accounts, and had, as a result of such investigation, concluded that there was a shortage, for which the first term sureties are liable. And, when we ⁴⁸⁰ consider that the governor had in fact inquired into the condition of the treasury before requesting the institution of the suit, and that the Lancaster county action is still presumably pending, we cannot doubt that there was sufficient evidence to take the case to the jury, and that it was error to direct a verdict in favor of the state for the full amount of its claim. In this connection it should be remembered that, while the attorney general testified that he had no personal knowledge of the facts alleged in the petition filed in Lancaster county, there is no proof in the record that the action was improvidently instituted, or that it has been yet abandoned. The state, it is true, offered to show that the Lancaster county case was commenced on the faith of a decision of this court which has been

recently overruled; but the trial court refused the evidence, and left the matter unexplained. The proffered testimony should have been received. It is always competent for a party to weaken the force of an admission by showing the circumstances under which it was made. For the error committed by the district court in refusing to submit the case to the jury the judgment is reversed, and the cause remanded for further proceedings.

NORVAL, J., dissenting. I am unable to agree with my associates to the proposition that the turning over by Bartley to himself, at the commencement of his second official term, of bank drafts, certificates of deposit, and other credits for and in lieu of money, relieved the bondsmen of his first term and charged the sureties for the second term with the amounts of such drafts, certificates of deposit, and other credits. It was held otherwise in an able opinion by Lake, C. J., in *Cedar County v. Jenal*, 14 Neb. 254, 15 N. W. 369, wherein it was stated: "Thus we see that, it being money that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over ⁴⁸¹ to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county to pay money. The payment of money can be effectuated only by the delivery of that which by the law of the land is recognized as money. . . . In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense: *Crim. Code*, sec. 124. It would indeed be a strange system of laws that would permit an act, denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice." It is true the decision in the case from which the foregoing excerpt was taken received a severe shock at the hands of the majority of the court in *State v. Hill*, 47 Neb. 456, 66 N. W. 541, but the writer there assailed, in lan-

guage as strong as he could command, the proposition that certificates of deposit were money, and that their acceptance from an outgoing officer as money released him and his sureties. I cannot better express the views I now entertain upon the subject than to here reproduce what I said in the Hill case. After quoting section 2, article 4, chapter 83, of the Compiled Statutes, this language follows: "The foregoing statute defining the duties of the state treasurer requires him to account for and pay over, on the expiration of his term, to his successor, all moneys received by him belonging to the state. This he can alone do by delivering the amount in actual cash. In no other way can he satisfy the conditions of his bond to ⁴⁸² well and truly perform the duties of his office required by law. It is money that he is required to pay over. It is idle to say that a certificate of deposit is money. We know it is not. It is the mere promise of the person or bank issuing it to pay money either on demand or at a fixed time. It is absurd to say that a promise to pay money is money. No person is required to accept such paper in discharge of a debt, and yet it is insisted that the liability of an outgoing officer and his sureties is released by the delivery to and acceptance by his successor of certificates of deposit in settlement, and that the state, whether it will or not, is bound. To such doctrine I cannot yield assent." Of course, when certificates of deposit, bank drafts, or other credits have been received in settlement from an outgoing officer for and in lieu of cash, and the money is thereafter realized thereon by the successor in office, to that extent the outgoing officer and his bondsmen are discharged from liability, for it is a payment in money when the cash is actually realized on the credits. The books in the state treasury left by Bartley, and the official statements made by him during his second term in charging himself with the specified amount of cash on hand, justifies the inference, in the absence of a showing to the contrary, that the money was obtained by Bartley on the credits which he turned over to himself at the beginning of his second term as state treasurer.

As to the decision in *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023, all I care to say is that the writer took no part in that decision.

I prefer not to express myself on the questions discussed in the opinion of Sullivan, J., relative to the execution, approval, and filing of the official bond of Bartley, but place my decision that the sureties are liable upon the proposition that, when this case was last before us, a judgment in their favor was reversed,

and the cause remanded for a new trial. This was, in legal effect, an adjudication that the bond was a valid obligation, and became the law of the case, binding alike upon the parties and the courts.

OFFICIAL BOND—DELIVERY.—An official bond is not regarded as delivered prior to its approval by the proper officer, and it has no operation until delivered: *People v. Van Ness*, 79 Cal. 85, 12 Am. St. Rep. 134, 21 Pac. 554.

OFFICIAL BOND—DELIVERY BY PRINCIPAL.—When an official bond is delivered by sureties to their principal, they thereby clothe him with authority to deliver it: *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261, 22 Atl. 8; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, 32 Pac. 538.

OFFICIAL BOND — FILING. — STATUTES requiring official bonds to be filed within a designated time are directory, not mandatory, and the failure to file a bond within that time does not work a forfeiture of the office or create a vacancy therein: *Board of Commrs. v. Johnson*, 124 Ind. 145, 19 Am. St. Rep. 88, 24 N. E. 148.

SUCCESSIVE OFFICIAL BONDS.—ON THE LIABILITY of sureties on successive official bonds, see the monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 843-860; *State v. Elliott*, 157 Mo. 609, ante, p. 643, 57 S. W. 1087.

WEIS v. ASHLEY.

[59 Neb. 494, 81 N. W. 318.]

STATUTES—ENACTMENT.—THE GOVERNOR of the state is part of the law-making power, and in acting on bills presented to him for approval or rejection he is engaged in the performance of a legislative duty enjoined upon him by the constitution.

CONSTITUTIONAL LAW—STATUTES—CHANGE IN TITLE OF BILL.—A material change in the title or body of a bill after it has passed the legislature, and before it is presented to the governor for his approval or rejection, renders the act unconstitutional and void.

J. D. Carson, for the appellant.

W. M. Clark, for the appellee.

495 SULLIVAN, J. This suit was instituted by Milton J. Ashley against Jacob Weis to recover the possession of a bay colt eight months old. The officer charged with the execution of the order of delivery being unable to find the animal, the action proceeded as one for damages, and resulted in a verdict and judgment in favor of the plaintiff for five dollars and forty

cents. The defendant, by this proceeding in error, raises an important question of constitutional law, the decision of which disposes of the case, and renders unnecessary an examination of other points relied on for a reversal of the judgment.

The plaintiff's claim to the possession of the colt in controversy is asserted under the provisions of section 40, article 1, chapter 4, of the Compiled Statutes of 1899, which is as follows:

"Sec. 40. That owners of stallions, jacks, and bulls in ⁴⁹⁶ the state of Nebraska have a lien upon the get of such stallion, jack, or bull for the period of nine months after the birth of same for the payment of the services of said stallion, jack, or bull; provided, that the owner of the stallion, jack, or bull shall have filed in the office of the clerk of the county in which such get is owned, a description of the same with date of birth within one hundred and twenty days after the birth thereof. Said lien may be at any time after the filing of said description foreclosed in manner and form as provided by law for foreclosing of chattel mortgages."

The original legislation upon this subject was enacted in 1883. The proviso was added by way of amendment in 1887. The contention of the defendant is that the amendatory act was not constitutionally adopted, and is, therefore, void. From the legislative journals it appears clearly that the title of the act of 1887, as it passed both branches of the legislature, was "An act to amend section 40 of article 1 of chapter 4 of the Compiled Statutes of 1885, entitled 'Animals,' and to repeal the said section so amended." The enrolled bill, which was sent to and which received the approval and signature of the governor, was entitled, "An act to amend section 48 of article 1 of chapter 4 of the Compiled Statutes of 1885, entitled 'Animals,' and to repeal the said section so amended": See Sess. Laws 1887, c. 3, p. 70. Section 48 of chapter 4 relates to the inspection of sheep, and is entirely unrelated to the subject embraced in the section sought to be amended. The question for decision is, whether the change in the title of the act after it had passed both branches of the legislature, and before its approval by the governor, was a violation of section 11, article 3, of the constitution, which declares: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." That section 40 could not be amended by an act professing in its title to amend section 48 is a proposition about which there can be no difference of opinion: See *State v. Tibbets*, 52 Neb.

228, 66 Am. St. Rep. 492, 71 N. W. 990. ⁴⁹⁷ But the position for which the plaintiff contends is that the constitutional inhibition has no application to bills after they have passed the legislature. We think it has. We think the scope and purpose of the provision should not be so limited by construction as to permit a measure of legislation to slough its title altogether, or assume a deceptive one, after having passed the legislature and before being presented to the executive for approval. The governor is a part of the law-making power, and, in acting on bills presented to him for approval or rejection, he is engaged in the performance of a legislative duty enjoined upon him by the constitution. "To him as well as to the legislature is confided the business of making laws": See *State v. Crounse*, 36 Neb. 835, 55 N. W. 246; *People v. Supervisor*, 16 Mich. 254; *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 South. 899; *In re Executive Communication*, 23 Fla. 298, 6 South. 925; *Cooley's Constitutional Limitations*, 6th ed., 184. Constitutional provisions similar to the one above quoted have been adopted in many states. The reasons for their adoption are thus stated by Judge Cooley in his work on *Constitutional Limitations*: "1. To prevent hodge-podge or 'log-rolling' legislation; 2. To prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted; and 3. To fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire": See *Cooley's Constitutional Limitations*, 6th ed., 172. The people have the right to petition the governor on the subject of proposed legislation: Const., art. 1, sec. 19; and, to give practical effect to this right, it would seem to be almost necessary to preserve the titles by which bills have become generally known. A protest against the approval of a bill amending section 40⁴⁰ aforesaid would hardly be considered ⁴⁹⁸ by the governor when acting on a measure which, according to its title, proposed to amend section 48. We think it would violate the letter and spirit of the constitutional safeguard against stealthy legislation to hold that the subject of a bill must be clearly expressed in its title during the progress of the measure through the legislature, but that any misleading or delusive title may be attached to it when it is presented to the governor for approval. The

precise point here considered was before the supreme court of Florida in the case of *State v. Green*, 36 Fla. 154, 18 South. 334. In the course of the opinion Mabry, C. J., said: "The office of the title of an act under constitutions like ours, it is evident, is to control the subject of an act of legislation, and to restrict its provisions to matter properly connected therewith. It may be that the necessity and reasons for the requirement that the subject of an act shall be restricted to the subject expressed in the title as it passes the legislative bodies do not exist with the same urgency as applied to the approval of the law by the governor; but still it is essential that an act have a title which will have a controlling effect over the subject matter of the act, and if the difference between the title of an act, as it passed the legislative bodies and when approved by the governor, is so essential as to affect the entire act, it cannot be said that the same act received the sanction of the entire legislative department of the state." This view of the matter seems to be countenanced, though not expressly decided, in *Stow v. Common Council*, 79 Mich. 595, 44 N. W. 1047. In *People v. Supervisor*, 16 Mich. 254, Cooley, J., said: "I am not prepared to say that an act of the legislature can be valid which, as engrossed for the signature of the governor, would be void if passed by the legislature in that form. A law must have the concurrence of the three branches of the legislative department; and if it differs in an essential particular, when presented to the governor for his signature, from the bill passed by the two houses, there is difficulty in saying that it has been concurred in ⁴⁹⁹ by all: See *Prescott v. Illinois etc. Canal Co.*, 19 Ill. 324. And under our constitution the title is not only important, but it is absolutely made to control; so that I do not see how any important change in the title can be said to be immaterial."

Our conclusion is that the act of 1887 (Sess. Laws, c. 3, p. 70), amending the prior act "for the protection of owners of stallions, jacks and bulls" (Sess. Laws 1883, c. 2, p. 58), was not adopted in accordance with the requirements of the constitution, and is, therefore, null. The judgment of the district court is reversed, and the cause remanded for further proceedings.

STATUTES, ENACTMENT OF.—THE GOVERNOR exercises a legislative function in approving statutes: *State v. Deal*, 24 Fla. 293, 12 Am. St. Rep. 204, 4 South. 899. When a bill has passed both branches of the legislature and been sent to the governor for approval, if the governor sends it back on the request of one house, any action it may take thereon is a nullity: *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DEARING v. McKINNON DASH & HARDWARE CO.

[165 N. Y. 78, 58 N. E. 773.]

COMITY BETWEEN STATES—LIMITATION UPON.—Judicial comity does not require the courts of one state to enforce any clause of an instrument executed by a corporation of another state to secure its creditors, which, even if valid under the *lex domicilii*, conflicts with the policy of the former state relating to property within its borders, or impairs the rights or remedies of domestic creditors.

TRANSFER IN OTHER STATES, WHEN NOT VALID AS TO CREDITORS HERE.—A transfer of property in another state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt. To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens, out of property within its boundaries and protected by its laws.

COMITY BETWEEN STATES—TRUST MORTGAGE EXECUTED BY FOREIGN CORPORATION TO SECURE ITS CREDITORS.—If a foreign corporation, becoming insolvent, executes a trust mortgage upon chattels, which permits it to keep possession of all its property, to continue its business, to buy, manufacture, and sell "in the usual course of trade," and has coercive provisions, requiring all creditors, before they can take any benefit therefrom, to come in under it and accept its terms, and, if their debts become due before the mortgage, to so extend the time of payment that they cannot be enforced until after the mortgage matures, such instrument, even if valid under the *lex domicilii*, is void upon its face as to chattels within this state, on account of such coercive provisions, and is ineffectual to withdraw the property from attachment by domestic creditors of the foreign corporation; and, without considering the coercive provisions, there is presented a question of fact as to actual and intentional fraud on the part of the mortgagor.

PLEADING PROVISIONS RELATING TO FRAUDULENT CONVEYANCES—SEIZURE UNDER LEGAL PROCESS.—In an answer justifying the seizure of goods under legal process, where

they have been previously transferred, the pleader is not required to specifically refer to the provisions relating to fraudulent conveyances. It is sufficient to allege that the goods levied upon were the property of the person against whom the process was issued, or that he had a leviable or attachable interest therein. That portion of the statute concerning fraudulent conveyances and contracts, which is waived unless pleaded, relates to contracts which, "although previously capable of valid proof by parol evidence," are declared to be void unless in writing.

Replevin, brought by Dearing, as trustee for the creditors of the Elms Buggy Company, against the defendant hardware company to recover the possession of a quantity of buggies attached by a sheriff in the state of New York. The defendants were the indemnitors of the sheriff and were substituted in his place. The title of the plaintiff depended upon a trust mortgage on chattels, executed in the state of Michigan, on May 22, 1896. The buggy company, a corporation organized under the laws of the latter state, had become insolvent, and had executed the instrument named to Dearing, as trustee, for the benefit of its creditors. The mortgage matured in ninety days, and permitted the corporation to keep possession of the property and continue its business, and to buy, manufacture, and sell, "in the usual course of trade," for the benefit of creditors, until stopped by the trustee. It contained a partial list of creditors and provided, without specifying the time, that the corporation should furnish the trustee with a complete list or schedule of the names of the creditors and the amount of their claims, which should be taken to be a part of the instrument so far as designating the persons to whom the residue of the proceeds of any sale of the property should be distributed, after paying all expenses of executing the trust. The instrument also had a "coercive clause" and significant phrases, the nature of which appear from the opinion. The mortgage covered buggies in various states, those in controversy being stored in the city of Rochester, state of New York. The buggy company was indebted to the hardware company on a promissory note, given for goods sold, and which fell due on June 15, 1896. On June 27, 1896, the hardware company, a domestic corporation of the state of New York, attached the buggies stored in the city of Rochester as the property of the buggy company. These buggies had formerly belonged to the buggy company, and still belonged to it when attached, unless the title thereto had passed to the plaintiff by virtue of the mortgage. The defendants alleged that the buggies belonged to the Elms Buggy Company, or that it had a leviable or attachable interest therein. The

defendants also relied upon the statute relating to fraudulent conveyances. The court directed a verdict for the plaintiff, but the appellate division reversed the judgment entered thereon and the plaintiff appealed.

Horace L. Bennett, for the appellant.

Charles M. Williams, for the respondent.

⁸⁶ VANN, J. According to the law of the state of Michigan, which was duly proved upon the trial, the instrument in question is a trust mortgage upon chattels, because the transfer was not absolute, but conditional, and passed neither title nor right to possession until after breach of the condition: *Cluett v. Rosenthal*, 100 Mich. 193, 43 Am. St. Rep. 446, 58 N. W. 1009; *National Bank of Oshkosh v. First Nat. Bank of Ironwood*, 100 Mich. 485, 59 N. W. 231; *Austin v. First Nat. Bank of Kalamazoo*, 100 Mich. 613, 59 N. W. 597; *Warner v. Littlefield*, 89 Mich. 329, 50 N. W. 721. If the transfer had been absolute, with the right to take immediate possession, it would, under the laws of Michigan, have been a general assignment and void, because a statute of that state prohibits preferences in documents of that character: *Pettibone v. Byrne*, 97 Mich. 85, 56 N. W. 236; *Atkinson v. Weidner*, 79 Mich. 575, 44 N. W. 1042; *Kendall v. Bishop*, 76 Mich. 634, 43 N. W. 645; 2 *Howell's Annotated Statutes of Michigan*, secs. 6184, 6193, 6194, 6203, 8739. Although it was given to a trustee for the benefit of creditors, according to the law of the state where it was executed, it was as valid as if it had been given directly to the creditors themselves: *Adams v. Niemann*, 46 Mich. 135, 137, 8 N. W. 719.

Whether the coercive clause, the provisions relating to ⁸⁷ the filing of a schedule of creditors by the mortgagor and the effect thereof, those permitting a continuance of the business with purchases and sales by the mortgagor, and those allowing the trustee wide latitude in selling, were established by evidence as valid by the law of the domicile of the mortgagor, we do not feel called upon to express an opinion: *Albion Malleable Iron Co. v. First Nat. Bank of Albion*, 116 Mich. 218, 74 N. W. 515. Judicial comity does not require us to enforce any clause of the instrument, which, even if valid under the *lex domicilii*, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors: *Keller v. Paine*, 107 N. Y. 83, 89, 13 N. E. 635; *Warner v. Jaffray*, 96 N. Y. 248, 255, 48 Am. Rep. 616. A transfer in an-

other state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt: *Guillander v. Howell*, 35 N. Y. 657. To this extent, in nearly all jurisdictions the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens, out of property within its boundaries and protected by its laws: *Hallgarten v. Oldham*, 135 Mass. 1, 7, 46 Am. Rep. 433; *Green v. Van Buskirk*, 5 Wall. 307, 312; 7 Wall. 139, 150.

The coercive clause of the mortgage in question required all creditors, before they could take any benefit therefrom, to come in under it and accept its terms, and, if their debts became due before the mortgage, to so extend the time of payment that they could not be enforced until after the mortgage matured. It not only withdrew from the trustee the power of paying any creditor who did not comply with these conditions, but also provided that after he had paid the creditors "in full who accept of this security and assent thereto," he was to pay the surplus to the mortgagor. The instrument was to "only operate in favor of those" so assenting, and the direction to pay was limited in the same manner. After payment "in the manner aforesaid and in the order aforesaid," the remainder was to go to the mortgagor, "its successors and ^{ss} assigns." Thus, no creditor could derive any benefit from the mortgage unless he agreed to waive the remedies provided by law for the collection of debts, and if he refused to so agree all the property of the mortgagor was placed beyond his reach for an indefinite period. If his debt was due and he brought suit within the ninety days, he was shut out from participation in the assets. If the mortgagor failed to include him in the schedule of creditors, which, although it was to be furnished at some undefined time after the execution of the mortgage, was, when furnished, to become a part of the instrument, or understated the amount of his claim, or it was disputed by some other creditor or by the trustee, he could not establish it "by lawful suit," as provided by law, without running the risk of serious loss. He might wait until the ninety-day period had expired, or even until his demand had outlawed, and then find that he was not on the list.

The forced extension of the term of credit involved an abandonment under compulsion of all legal remedies for the collection of claims during the period of extension. This was

an unreasonable exaction, in conflict with the policy and laws of our state, which opens the doors of its courts to enable creditors to collect their debts as soon as they fall due. A failing debtor in another state cannot compel a resident of this state to forego his right to the remedies afforded by our laws. He cannot by an agreement with a third party made outside of this state withdraw his property from the reach of legal process in this state, "in order to compel his creditors under the apprehension of losing all their claims to comply with a law of his own enactment": *Marsh v. Bennett*, 5 McLean, 117, 126, Fed. Cas. No. 9110. He cannot thus play upon the fears of his creditors in order to "coerce them into his own terms": *Grover v. Wakeman*, 11 Wend. 187, 201, 25 Am. Dec. 624; *Hyslop v. Clarke*, 14 Johns. 458. While in the cases cited the coercive condition required a release of the debt in order to share in the fund, the principle is the same where the creditor is compelled to extend the time of payment, which is virtually a covenant not to sue, or be shut out entirely, for a debtor cannot constrain his ⁸⁰ creditor to forego by affirmative action a right provided by law.

The claim of the attaching creditor became due about forty-five days before the mortgage, which was to run for ninety days. That creditor did not see fit to accept the privilege afforded by the mortgage upon the conditions imposed, and the necessary effect upon it and others similarly situated was that all the assets of the insolvent debtor would be converted into money and paid over to such creditors only as accepted the terms exacted, and whatever remained would be restored to the mortgagor. The hindrance and delay thus caused is precisely what the statute relating to fraudulent conveyances aims to prevent. A more adroit and dangerous method of evading that statute and violating its provisions has seldom been devised. An insolvent corporation, under the protection of this ingenious instrument, is permitted to keep possession of all its property, to continue its business, to buy, manufacture, and sell "in the usual course of trade," which admits of sales on credit, and the creditors, whether preferred or unpreferred, unless they are willing to let this condition of affairs continue for ninety days and tie their own hands by an extension of time for the payment of their debts, must lose all benefit from the mortgage and every chance of having their debts paid out of the assets of the mortgagor until a surplus, after paying all assenting creditors, should come back into its pos-

session. There was not even a promise by the mortgagor to pay the proceeds of sales to the trustee, although the latter was "authorized and empowered to receive" them. Thus, the mortgagor could keep its creditors at bay for ninety days, and continue in the possession and use of its property during that period. The inevitable result would be to hinder and delay creditors in violation of law.

The mortgage was void upon its face on account of the coercive provisions which it contained. Independent of those provisions, the peculiar circumstances presented a question of fact as to actual and intentional fraud on the part of the mortgagor. The device was clever, but the exceptional and extraordinary ⁹⁰ facts laid the honesty of the debtor's purpose open to the judgment of a jury, who might find dishonesty and fraud, notwithstanding, as stated in an old statute, the "show of words and sentences, as though the same were made bona fide for good causes and upon just and lawful considerations": 27 Elizabeth, c. 4; Rev. Stats., sec. 4, p. 137; Russell v. Winne, 37 N. Y. 591, 97 Am. Dec. 755; Smith v. Acker, 23 Wend. 653; Wood v. Lowry, 17 Wend. 492.

It is, however, claimed that the statute relied upon by the defendants affords them no protection, because they did not specifically plead it in their answer. This statute, commonly called the statute of frauds, but not so entitled, consists of chapter 7, part 2, of the Revised Statutes, entitled, "Of fraudulent conveyances and contracts relative to real and personal property." The provisions concerning fraudulent conveyances, which apply to every kind of property, are a re-enactment, with changes, of an ancient act, which is frequently, but not accurately, called the statute of frauds: 1 Rev. Stats., pt. 2, c. 7, vol. 2, p. 133, 9th ed., p. 1883; 13 Elizabeth, c. 5. Those regulating the evidence necessary to establish certain contracts are a re-enactment, with changes, of a later "act for the prevention of frauds and perjuries," which is properly called the statute of frauds: 29 Charles II, c. 3. The two statutes, which differ widely in origin and object, are now blended into one. The earlier was little more than a codification of the common law with reference to transfers of property in fraud of creditors, while the later made a radical innovation upon the common law by establishing a new rule of evidence.

The established practice does not require a pleader to specifically refer to the provisions relating to fraudulent conveyances in an answer justifying the seizure of goods under legal

process. It is sufficient to allege that the goods levied upon were the property of the person against whom the process was issued, or that he had a leviable or attachable interest therein. Such is the form of the answer in the case before us, which we regard as sufficient without specific reference to the statute. Those portions of the statute that are waived unless⁹¹ pleaded relate to contracts which, "although previously capable of valid proof by parol evidence," are declared to be void unless in writing. This, as it is held, creates a new defense, which must generally be pleaded, or the protection of the statute will be lost. The cases relied upon by the appellant are all of that class and have no application to this appeal: *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Matthews v. Matthews*, 154 N. Y. 288, 48 N. E. 531; *Sanger v. French*, 157 N. Y. 213, 234, 51 N. E. 979.

The order of the appellate division should be affirmed and judgment absolute rendered against the appellant, in accordance with his stipulation, with costs in all courts.

Parker, C. J., Gray, Bartlett, Martin, Cullen, and Werner, JJ., concur.

COMITY—CONFLICT OF LAWS.—A state is not bound to give effect to contract rights growing out of a foreign law, when to do so will prejudice the rights of its own citizens: See the monographic note to *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 776, discussing the enforcement of contracts outside of the jurisdiction where made. Comity does not require the courts of one state to enforce the law of another, where the law of the latter state clashes with the rights of citizens of the former, or with the policy of its laws: *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62.

KIRKHAM v. BANK OF AMERICA.

[165 N. Y. 132, 58 N. E. 753.]

BANKS.—A CREDIT ENTRY IN A DEPOSITOR'S PASS-BOOK CANNOT BE CANCELED by a bank after it has acknowledged its relation of debtor to him. Hence, if it receives from him for collection a draft indorsed by another, forwards it to its subagent, which receives the drawee's check for the amount, and upon being notified of that fact by the subagent gives the depositor credit in his pass-book for the amount, it cannot afterward, upon nonpayment of the check, cancel the credit given to the depositor, for it must be deemed to have intended to treat the draft as paid. The entry in the pass-book closes the transaction of collection and charges the bank as a debtor to its client for the amount of the draft.

Action by Kirkham against the defendant bank. On October 25, 1890, the plaintiff received a sight draft drawn by the Interstate Investment Company upon the Bank of South Hutchinson, Kansas. It was deposited by the plaintiff with the defendant for collection. The defendant forwarded the draft to its agent, the Boatmen's Bank of St. Louis, Missouri, which latter bank forwarded the draft to its agent, the First National Bank of Hutchinson, Kansas. The last-named bank presented the draft to the drawee bank, which accepted it and paid it by a demand check of the drawee upon the Merchants' Exchange National Bank of New York City. The defendant's agent received from its agent in Hutchinson the check of the drawee of the draft, payable to the order of the Boatmen's Bank. The latter thereupon credited the defendant with the amount of the check, subject to its payment, and forwarded it to the defendant with notice to that effect. The defendant, upon its receipt on November 3, 1890, credited its amount to the Boatmen's Bank. On the same day the defendant credited the amount of the draft to the plaintiff. The check was dishonored upon its presentment for payment, on November 5, 1890, to the Merchants' Bank, and the same was protested; and, on November 26, 1890, the defendant canceled the credit given to the plaintiff in his pass-book. The complaint, for a first cause of action, charged that the failure to collect the amount of the draft was due to the negligent act of the defendant, in accepting payment, through its agent, of the draft by check, instead of in cash, and that it was answerable to the plaintiff for the amount of the check; and for a second cause of action it charged the defendant with a liability in damages to the plaintiff for the amount of the draft, in that, by reason of the defendant's negligence in the premises, and to return it, the plaintiff was unable to enforce its payment against Blanchard, who was liable upon it and able to pay it. The complaint was dismissed, but the appellate division reversed the judgment and ordered a new trial. The defendant appealed, giving the usual stipulation for judgment absolute in the event of an affirmance.

Charles E. Rushmore, for the appellant.

Everett Masten, for the respondent.

135 GRAY, J. The facts, which were either proved without dispute or were conceded, raised the question of law whether the defendant had made itself liable to the demand of the

plaintiff in the amount of the draft deposited with it for collection. The determination which was made by the court at special ¹³⁶ term, in favor of the defendant, has been reversed by the appellate division solely upon the law. The view of that learned court was that, as between the defendant and the drawee of the draft in collection, the receipt of the check of the latter was a payment of the draft, and that the crediting by the defendant of the amount to the plaintiff's account made it his debtor. It was considered that the presumption that the check of the drawee of the draft was received by the defendant's agent in payment became absolute, in the absence of any repudiation of the agreement to accept it as payment, or of its return to the South Hutchinson Bank with a demand for the return of the draft. This view was rested upon the proposition that the defendant was bound to return to the plaintiff the draft which he had deposited or the money, and that, to justify the cancellation of the credit given him for the amount and the refusal to pay him the money, the defendant was bound to return to him the draft properly protested. The discussion of this case at the appellate division was very extended; but I think that the question involved resolves itself into this simple proposition, Was the defendant not concluded by its conduct from denying that it had rendered itself liable to the plaintiff? If that is true, then that result must be attributed to its negligent conduct of the transaction, which, in its consequences, places it in a position where it cannot gainsay its liability. I think, that, upon the undisputed facts of this case, there was but the one legal conclusion possible, and that is, that the defendant must be deemed to have intended to treat the draft as paid, and that that intention was conclusively expressed when it entered the item as a credit to the plaintiff. The question of that intention was, of course, under the circumstances, purely one of law: *Clark v. Merchants' Bank*, 2 N. Y. 380.

The complaint alleged all the facts upon which to predicate the liability of the defendant, and within the rule as laid down in *Whiting v. City Bank*, 77 N. Y. 363, the plaintiff was entitled to recover, notwithstanding that he may have stated the ground inartificially or erroneously.

¹³⁷ It may be observed that this is not the case of the collection of the simple draft of the plaintiff's debtor; but that it is one where the draft bore the indorsement of another. When the defendant assumed the duty of collecting the draft, it was

bound to exercise reasonable care in the performance of that duty, and the measure of its responsibility was, if it failed to collect the amount of the draft, to account to the plaintiff for the draft, properly protested for nonpayment. Assuming that the defendant was entitled to rely upon the custom among banks of taking the check of the drawee of the draft for the payment of the same, it was bound to the exercise of care for the protection of all of its depositor's rights and, to preserve itself from assuming any further liability to him in the matter, to be reasonably cautious in what it did, that its relation to him of a collecting agent should not be changed. When, on November 3d, it was in receipt of the drawee's check, it might have retained the check until after presentation for payment, when, if payment was refused, it might have caused the check to be returned to the South Hutchinson Bank, in order that, by the return of the draft, and its due protest for nonpayment, the plaintiff's rights upon it should be fully protected. But it appears to have rested upon its agent's responsibility in accepting the check of the drawee of the draft by, immediately upon its receipt, giving credit to the plaintiff as for a collection made. It was not until November 26th, twenty-one days after giving that credit, that it appears to have undertaken to revoke the credit given.

The plaintiff was no party to the proceedings for collection, and the agencies selected by his bank to collect the draft were in no sense his agencies: *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849. He had the right to look for the return of his draft properly protested, if unpaid, or to a credit of its amount. When, therefore, on November 3d he was notified by the defendant that he was credited with the amount of the draft, and the amount was placed to his credit by the entry in the pass-book, brought to the bank upon its request, he was entitled then to regard the bank as having become his debtor ¹³⁸ for its amount. The general rule is that credit given in a pass-book binds the bank, and, in the absence of some clerical mistake with respect to the entry, when the credit entry has been made, the bank has then charged itself with a debt absolutely due to its customer: *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, 537. The result of the action of the defendant on November 3d in sending for the plaintiff and in making the credit entry in his pass-book was to close the transaction of collection and to charge itself as a debtor to him for the amount of the draft. The plaintiff could have

drawn out all of the money on that day standing to his credit, and the bank, upon the nonpayment of the check when presented on November 5th, would have had no legal claim upon him to compel repayment. By admitting an indebtedness for the money on November 3d, it had assumed all the risks of its agent's transaction. I think that the action of the defendant was conclusive evidence of an intention to change its status from that of a mere collecting agent to that of a debtor to the plaintiff for the amount of the draft. The relations of a bank to its depositor, while within the influence of morals, are nevertheless governed by legal rules. The plaintiff had the right to hold the defendant to the obligation it had assumed, and especially as he had done nothing to influence its action. The defendant having acknowledged the relation of debtor, how could the plaintiff be estopped from insisting upon the defendant's liability because of any part which he may have taken in aiding the latter to procure the payment of the check by Blanchard, the indorser upon the draft? The plaintiff never consented to the cancellation of the credit, and I do not think that it was within the right or the power of his debtor alone to vary the agreement implied from the previously assumed relation of debtor and creditor.

I think the order should be affirmed, and, under the stipulation, that judgment absolute should be ordered against the defendant, with costs.

Parker, C. J., Martin, Vann, Cullen, and Werner, JJ., concur.

Bartlett, J., concurs in result.

BANKS—DEBTOR AND CREDITOR—DEPOSIT OF COMMERCIAL PAPER.—If a check is offered and received as a deposit, the bank is bound accordingly. Checks, drafts, or other evidences of debt received by a bank in good faith as deposits, and credited as so much money, become the property of the bank, and it becomes legally liable to the depositor as for so much money deposited as of the date of the credit: See the monographic note to *Ditch v. Western Nat. Bank*, 47 Am. St. Rep. 389, on the effect of a check indorsed "for deposit." As to the effect of a bank giving a "provisional credit" to a customer, and the right to cancel it where paper is dishonored, see the monographic note to *Minneapolis etc. Co. v. Metropolitan Bank*, 77 Am. St. Rep. 627, concerning the duties of banks acting as collecting agents.

DE KLYN v. GOULD.

[165 N. Y. 282, 59 N. E. 95.]

MECHANIC'S LIEN—NOTICE OF CLAIM—FAILURE TO STATE NAME OF TRUE OWNER.—Under a statute requiring a notice of claim of a mechanic's lien to contain the name of the owner, lessee, general assignee, or person in possession of the premises, against whose interest a lien is claimed, but providing that the failure to state such name shall not impair the validity of the lien, the word "failure" evidently means an unsuccessful attempt to name or designate such person. It does not mean that the lienor may name the lessee as the true person against whose interest he claims a lien, and then afterward proceed against the lessor, against whose interest he did not intend to file notice of a claim.

MECHANIC'S LIEN — INCREASED IMPROVEMENTS — CONSENT OF OWNER WILL NOT BE IMPLIED, WHEN.—If a tenant of real property binds himself, by the terms of his lease, to make certain alterations and improvements thereon, at his own expense, but makes an important and expensive departure from the specifications, involving an extravagant outlay of money, far beyond the amount originally contemplated, the owner is not answerable for the extra work done or the materials furnished therefor, on the ground of consent, where he has not said or done anything to mislead the lessee or the contractor. The owner's consent will not be implied from a mere acquiescence in the alterations and improvements.

Action to foreclose a mechanic's lien against the respondent, Annie W. Gould, and the other defendants, Joseph H. Simpson and the corporation styled "Simpson's." A judgment in favor of the plaintiff was entered in the trial court upon the report of a referee. This judgment was reversed by the appellate division, and the plaintiff appealed.

David Willcox and Louis M. Fulton, for the appellant.

John E. Parsons, for the respondent.

²⁸³ LANDON, J. The notice of lien stated: "That the name of the owner against whose interest a lien is claimed is Simpson Company." It did not contain the name or designation, true or false, of any other person or party against whose interest a lien was claimed.

²⁸⁴ Section 4 of the mechanics' lien law (Laws of 1885, c. 342), under which this notice of lien was filed, requires that the notice shall contain "the name of the owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed." The statute does not invite the suppression of names; it requires the expression of the names of those persons against whose interest a lien is claimed, but

it also contemplates that some other name than that of the true person against whose interest a lien is claimed may be stated, and hence it further provides: "But the failure to state the name of the true owner, lessee, general assignee, or person in possession shall not impair the validity of the lien." The corporate name of the Simpson Company was "Simpson's." As the name "Simpson Company" was used, the statute undoubtedly cures the failure to use the true name "Simpson's"; and this illustrates one phase of the meaning of the curative clause. If the referee had found that the lienor believed after due inquiry the Simpson Company to be the true owner, the case would be different. The evidence does not permit us to presume such to be the fact.

In the connection in which the word "failure" is here used, it evidently means an unsuccessful attempt to name or designate the true owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed. It does not mean that the lienor may name the lessee as the true person against whose interest he claims a lien, and then afterward proceed against the lessor, against whose interest he did not intend to file notice of a claim: *Grippin v. Weed*, 22 App. Div. 593, 48 N. Y. Supp. 112; affirmed, 165 N. Y. 612, 59 N. E. 1123. The contractor testified that before he filed his lien Mr. Simpson, the lessee, introduced him to Dr. Gould as the owner of the premises. Dr. Gould was the husband of Mrs. Gould. When the contractor made his contract with Simpson's he was put upon inquiry as to the owner: *Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896. And he now received information near enough to the truth to enable him to file notice of lien against the true owner.

Under the act of 1885 "the names of the owners and other ²⁸⁵ persons in interest, and other persons against whom the claims are made," must be entered in the county clerk's docket. Formerly the law did not make this requirement: See *Leiegne v. Schwarzler*, 10 Daly, 547. Unless some attempt is made to name the parties against whose interest a lien is claimed, the docket will not give the notice the law intends it should give.

2. We must presume that the appellate division did not reverse the judgment upon the facts, since no statement that it did so reverse appears in its order or judgment: Code Civ. Proc., sec. 1338. The referee found that "the labor and materials for which the lien was filed were furnished and performed with the knowledge and consent of the said Annie W. Gould."

We may inquire whether this fact was found without any evidence which according to any reasonable view would warrant it: *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412.

The lease was given by Mrs. Gould on July 18, 1892, to Joseph H. Simpson, who was then the tenant in possession under a lease to expire May 1, 1893, from which date this lease was to continue for the term of twelve years. It contained provisions to the effect that the lessee "shall and will at his and their own cost and expense make changes and improvements on the above-named premises," specifying them, the whole to be done at his and their cost, and without any cost to the lessor, the lessee agreeing to pay for the improvements and to suffer no mechanics' liens to be placed on the premises, and to discharge the same within twenty days, if any should be so placed, under penalty of forfeiture.

The specified improvements would cost about ten thousand dollars. The lessee in August, 1892, organized the corporation, Simpson's, and in January, 1893, "undertook to assign the lease to it upon securing Mrs. Gould's consent," the lease requiring her consent, and placed it in possession of the premises. It continued in possession, and paid the rent until October, 1896, when it was dispossessed by the lessor. On January 14, 1893, Simpson's made a contract with Peter J. Brennan, the plaintiff's assignor, by which the latter agreed to make certain ²⁸⁶ alterations and improvements upon the premises for twenty-seven thousand five hundred dollars, and containing a provision for extra work. Brennan performed before October following, and Simpson's paid him the contract price, less fourteen thousand three hundred and eight dollars and ninety-nine cents, for which this notice of lien was filed. Other work was done by Simpson's, the entire improvement costing about forty-five thousand dollars, and adding to the value of the property about forty thousand dollars.

The referee finds as follows: "While the work on these premises was in progress, said Annie W. Gould and her husband were frequently in the street, saw the premises in question and the work going on, and Mr. Gould was aware of the nature of the work in progress and mentioned the matter to Mrs. Gould. No statement was ever made to them as to the probable cost of the alterations specified in the lease; they made no inquiries upon that subject, and made no objection to the manner in which the requirements of the lease were fulfilled. Neither Mrs. Gould nor Mr. Gould has any objection

to make now, as they consider that the work specified by the lease has been fully performed."

The owner's interest in his real estate is not liable in every case in which to his knowledge labor and materials are furnished for erections upon his real property or alterations in the existing erections: *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896; *Havens v. West Side Electric etc. Co.*, 17 N. Y. Supp. 580; 20 N. Y. Supp. 764; affirmed, 143 N. Y. 632, 37 N. E. 827. There are many cases in which the owner's consent has been implied from the circumstances and his declarations and acts in respect to the improvements. The appellant largely relies upon *National Wall Paper Co. v. Sire*, 163 N. Y. 122, 57 N. E. 293, and the cases therein cited in which the owner's consent was inferred or implied. In that case it was pointed out by O'Brien, J., writing for the majority of the court, that by the terms of the lease the tenant was under no obligation to make the improvements; he was permitted to make them at his own expense; that before the tenant engaged the contractor to make them, he conferred with the lessor, exhibited to him a specimen room of the decorations he intended to ²⁸⁷ make throughout the whole house, and told him that he ought to pay part of it, and the lessor replied: "Well, I will see how well it is done"; that the lessor was in attendance during the progress of the work, and frequently expressed his admiration and approval, and in a few weeks after the completion of the work dispossessed his tenant.

The case before us lacks these features and has no element tending to show that the lessor misled her tenant to his extravagant outlay. This case, as well as the others it cites, indicates that mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting the truth. Here the owner carefully stated in the lease her position with respect to alterations and improvements, and it may be assumed that both the amount of the rent and the length of the term were influenced by the tenant's agreement to make the specified repairs. She never was asked to declare her position with respect to the important and expensive departure by the tenant from the specifications,

and she misled neither the tenant nor the contractor. Undoubtedly she consented to such alterations and additions as the lease called for, but as the terms of the lease accompany that consent we cannot separate it from them. She could accept the larger performance by the tenant as satisfactory performance under the lease, and in the absence of evidence that she did more, we cannot enlarge the scope of her acceptance in order to make her bear a greater liability than she ever consented to incur.

The order should be affirmed and judgment absolute ordered for defendant on the stipulation, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Martin, and Vann, JJ., concur.

A NOTICE OR CLAIM OF A MECHANIC'S LIEN MUST STATE, either directly or by necessary inference, the name of the person to whom the claimants furnished material, or for whom they performed the labor; otherwise no lien can be enforced: *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, 48 Pac. 355.

AESCHLIMANN v. PRESBYTERIAN HOSPITAL.

[165 N. Y. 296, 59 N. E. 148.]

MECHANIC'S LIEN — BOND TO DISCHARGE. — THE SURETIES upon a bond given to discharge a mechanic's lien may defend an action against themselves and their principals to foreclose it, though the judgment demanded is in form against the property represented by the bond, and may show therein that the amount of the claim in the notice of lien is exaggerated and false, and that the plaintiffs are not entitled to a judgment for the amount claimed, although their principals do not see fit to defend.

MECHANIC'S LIEN—FORFEITURE OF BY FABRICATED DEMAND.—The insertion of an exaggerated and willfully false and fabricated demand in the notice of a mechanic's lien forfeits the right of the claimant to enforce it upon property against which it is filed. Hence, the plaintiffs in an action which is in form one to foreclose a mechanic's lien, but which is in fact an action upon a bond given to procure a discharge of the plaintiff's lien, cannot recover against the sureties upon the bond where the plaintiffs inserted in their notice of lien statements of their claim which were intentionally exaggerated and fictitious, and made for the purpose of enforcing a false and fabricated demand.

Action to foreclose a mechanic's lien, brought by Aeschlimann and others against the Presbyterian Hospital and others. The complaint was dismissed by the trial court. The appellate

division affirmed a judgment for the defendants, entered upon the dismissal, and the plaintiffs appealed.

George Putnam Smith and Henry A. Vien, for the appellants.

Frederic E. Perham, for the respondents.

298 MARTIN, J. This was in form an action to foreclose a mechanic's lien filed by the plaintiffs as subcontractors under the defendants Smyth and Robinson, the original contractors with the Presbyterian Hospital. It was, in fact, an action upon a bond given to procure a discharge of the plaintiff's lien, in which the defendants Smyth and Robinson were principals and the defendants Dunn and Hutkoff were sureties.

The lien was to secure payment for work and materials performed and furnished by the plaintiffs upon property owned by the hospital. It was based upon an agreement between the original contractors and the plaintiffs, whereby the latter agreed, for \$3,900, to do all the mosaic tiling in the corridors and operating pavilion of the hospital strictly in accordance with plans and specifications which were a part of the contract. It was also based upon a claim that certain work and materials had been furnished for that purpose, which were reasonably worth the sum of \$5,575.40; that an increased expense had been incurred in the employment of laborers amounting to \$400, one-half of which the defendants Smyth and Robinson agreed to pay, and upon a claim for extra work performed by the plaintiffs in relaying the mosaic floor in the corridors and in cutting the concrete in the operating rooms, which was alleged to have been done at the request of the original contractors and to be worth \$51.

The complaint admitted that Smyth and Robinson had paid the plaintiffs \$3,240 on account of the work performed and materials furnished by them. It was then alleged that, after the filing of the plaintiffs' notice of lien, the original contractors instituted a proceeding under the statute to authorize the filing of a bond to discharge such lien; that such proceedings were had that an order was duly entered approving of the bond filed, and the plaintiffs' lien was canceled and discharged. **299** The condition of the bond was that in case of payment by the original contractors of any judgment which might be recovered against the premises by reason of the plaintiffs' claim, the obligation of the bond should be void, otherwise to remain in full force. The demand for judgment was, that the plaintiffs be

adjudged to have a valid lien upon the premises for \$2,786.40, with interest from May 23, 1893, besides costs; that the sureties be declared liable therefor, and that the plaintiffs have judgment for that sum against the defendants Smyth and Robinson and against the respondents as sureties upon their bond.

The original contractors interposed no defense. The sureties, however, answered by denying all the allegations of the complaint, except as to the amount paid to the plaintiffs, and as to that they alleged that it was \$3,340 instead of \$3,240. They admitted the allegations to the effect that a proceeding was instituted to discharge the plaintiffs' lien, and that a bond was given for that purpose which was executed by the original contractors as principals and by the respondents as sureties.

On the trial the plaintiffs insisted that the respondents, who were mere sureties for the original contractors, by the default of the latter, were precluded from questioning the amount of the plaintiffs' claim or the liability of the respondents therefor. The trial court held that the sureties were not precluded by such default from questioning the amount or validity of the plaintiffs' claim.

The court found that when the plaintiffs filed their lien for \$2,786.40 they were, according to the terms of their written agreement, entitled to recover only \$611; that the plaintiffs' claim that the written agreement was subsequently modified by an oral one, by which the original contractors agreed to pay a large additional sum to compensate them for an alleged mistake on their part, was not substantiated by the evidence, but that the plaintiffs entirely failed to establish a subsequent oral contract; and that the claim of the plaintiffs that they were delayed by the contractors, and therefore obliged to incur increased expense in the hire of labor, and that the contractors ³⁰⁰ agreed to pay one-half thereof, was not substantiated by the proof. But the court found to the contrary, that the contractors did not delay the work, were not responsible for such increased expenditure, and did not agree to pay any part thereof.

From these facts, with the added fact that the day before the notice of lien was filed for \$2,786.40 the plaintiffs rendered to the contractors a bill, which was in full for the amount then due, in which they claimed only \$811, the court further found that the claim in the notice of lien was enormously exaggerated; that this was done intentionally by pretense of a fictitious contract for the purpose of enforcing a false and fabricated demand, and held that the plaintiffs thereby forfeited their right to re-

cover against the sureties and directed a judgment in their favor.

As the affirmance of the judgment of the trial court was unanimous, no question of fact is before us for determination. The facts as found must be regarded as correct and so treated in the determination of any question presented upon this appeal. Hence, it must be assumed that the only contract which existed between the parties was the written one; that the claim stated in the plaintiffs' notice of lien was to a very great extent intentionally false and fabricated, and that there was sufficient evidence to sustain those findings.

Under these circumstances, the only possible questions of law which are presented for determination by this court are: 1. Whether the sureties upon the bond of the original contractors were properly allowed to show that the amount of the plaintiffs' claim was exaggerated and fictitious, and that they were not entitled to a judgment for the amount claimed; and 2. Whether the insertion of an exaggerated and willfully false and fabricated demand in the notice of lien rendered it invalid.

It seems to be well established, as a general rule, that a surety may defend an action against this principal, may set up any legal or equitable defense which would have availed the former and may establish it by proof, especially when ³⁰¹ a party to the action. Does the fact that this action was to foreclose a mechanic's lien and that the judgment demanded was in form against the property represented by the defendants' bond in any way alter that rule? We think not. The condition of the bond substantially required the sureties to pay any judgment which might be recovered against the premises upon the claim set forth in the plaintiffs' notice of lien. It ought not to require discussion or authority to sustain the proposition that the judgment which the sureties agreed to pay was only a judgment properly obtained for the actual amount which was owing by the original contractors to the plaintiffs. We are aware of no principle of law which would justify us in holding that the sureties upon such a bond were bound by an exaggerated and false claim, and in an action to which they were parties were debarred from showing the truth in regard to it, although their principals did not see fit to defend. Such a doctrine would open the door for fraud and collusion between contractors and subcontractors, by which sureties might be made liable for a claim which did not exist. We think no such principle can be sustained. "The liability of the bondsmen was conditioned on the plaintiff suc-

cessfully establishing a lien on the property. This is so both by the language of the bond and the terms of the section of the statute under which it was given. . . . The very object of the provision of the statute permitting the bonding of the property when a notice of lien has been filed is to enable the owner or contractor to free the property from the encumbrance without acknowledging its validity and to permit him to contest, in a subsequent action, the existence and amount of the lien": *Parsons v. Moses*, 40 App. Div. 58, 60; 57 N. Y. Supp. 727, 728. In an action upon this bond it is doubtless true that if the sureties had not defended, a judgment for the full amount of the plaintiffs' claim would have been binding upon them, and hence, the principals having interposed no answer, it became important for the sureties to appear and defend, and thus save themselves from being charged with an unjust, false, and exaggerated ³⁰² claim. We think the court correctly held that the sureties were not precluded from defending this action by the default of the contractors.

This leaves for consideration the question whether the plaintiffs have forfeited their right to recover in this action by inserting in their notice of lien statements of their claim which were intentionally exaggerated and fictitious and made for the purpose of enforcing a false and fabricated demand. While this court in *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175, to some extent considered the effect of inserting in the notice of a mechanic's lien mistaken statements of fact, it has never been called upon to decide whether important or material statements, which are willfully and intentionally false, forfeit the right of the lienor to enforce his lien or maintain an action thereon. In discussing the question in that case it was in effect said that if a party, by inserting in a notice of mechanic's lien statements of facts which are shown to be untrue, thereby forfeits the right to a lien and renders the notice void or ineffectual, a proper construction of the statute requires that statements to have that effect must not only be untrue, but must be willfully and intentionally false in some important or material respect. The facts as found by the trial court in this case bring it within the prescribed rule which was there stated, although not actually adopted. The question is now presented whether the plaintiffs are entitled to recover, or whether their right to enforce their lien was forfeited by the willfully and intentionally false statements contained in their notice as to the amount of their claim. The weight of authority in other courts of this

state and in the courts of other commonwealths seems to be that where a claimant makes statements which are important and material, and they are willfully and intentionally false, he cannot enforce his lien upon the property against which it is filed. Those decisions are based upon the theory that the purpose and intention of the lien law was to exact from the lienor a truthful statement of the facts contained in the notice, as well for the benefit of other claimants as for the owner of the ³⁰³ property and for the correct information of the court: *Foster v. Schneider*, 50 Hun, 151; 2 N. Y. Supp. 875.

In *Goodrich v. Gillies*, 66 Hun, 422, 21 N. Y. Supp. 400, where it was found that the plaintiff willfully and fraudulently misrepresented in his notice of lien the amount which was due him, the court decided that it was its duty to so construe the statute as to prevent parties from obtaining a lien by following the language of the statute, when they knew that the proof which must be given when the action was brought for its enforcement must fail to establish that they were entitled to more than a small portion of the sum for which the lien was claimed. Upon a subsequent trial of that case, where it was found that the amount inserted in the notice of lien was mistakenly stated, the claimant honestly believing that all the material claimed for had been furnished, it was held that a mere mistake, in the absence of an intention to exaggerate the amount of his claim, would not invalidate his lien: *Goodrich v. Gillies*, 82 Hun, 18; 31 N. Y. Supp. 76.

In *Close v. Clark*, 16 Daly, 91, 9 N. Y. Supp. 538, it was held that a mechanic's lien is invalid where founded upon a notice of lien filed by a contractor for the unpaid balance of whole contract price, which states that all the work and materials have been performed and furnished, when in fact part of the work was unperformed and some of the materials were not furnished.

In the earlier cases in Massachusetts it was held that any error in the claim stated in the notice of lien destroyed the lien or the right to enforce it: *Lynch v. Cronan*, 6 Gray, 531; *Truesdell v. Gay*, 13 Gray, 311. These decisions led to subsequent legislation, by which it was declared that any inaccuracy in the claim should not invalidate the lien unless the claimant intentionally and willfully claimed more than was his due: *Hubbard v. Brown*, 8 Allen, 590; *Jones v. Keen*, 115 Mass. 170. The rule in Michigan is that where a claimant places upon record in his notice of lien a statement which he knows to be incorrect, his lien is lost: *Gibbs v. Hanchette*, 90 Mich. 657, 51 N. W. 691.

The Iowa courts have held that where a lienor intentionally makes a statement in the notice of lien which is not just and true, he cannot enforce the lien: ³⁰⁴ *Stubbs v. Clarinda etc. Ry. Co.*, 65 Iowa, 513, 22 N. W. 654. There are many other cases where this principle has been asserted, among which are *Gaskell v. Beard*, 58 Hun, 101; 11 N. Y. Supp. 399; *McKinney v. White*, 15 App. Div. 423; 44 N. Y. Supp. 561; *Mull v. Jones*, 45 N. Y. St. Rep. 643; 18 N. Y. Supp. 359; *Brandt v. Verdon*, 44 N. Y. St. Rep. 885; 18 N. Y. Supp. 119; *Rose v. P. & B. Paper Works*, 29 Conn. 256; *Uthoff v. Gerhard*, 42 Mo. App. 256; *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21.

We think the rule so generally established is a proper one, and should be adopted by this court. There certainly can be no hardship in requiring a claimant to avoid intentionally and willfully making an exaggerated claim which he knows not to exist. The requirement that he shall truthfully state his claim is in no way unjust to the claimant, but it is pre-eminently just to the owner, to other claimants or lienors, and to those who are engaged in administering the lien law. We are, therefore, of the opinion that the trial court, having found that the plaintiffs "enormously exaggerated" their claim and intentionally and by pretense of a fictitious contract sought to enforce and establish a false and fabricated demand, was justified in holding that the plaintiffs had thereby forfeited their right to recover any judgment against the sureties upon the bond in question.

The appellants also claim that the court erred in holding that the statement in their notice of lien was fraudulent. That question is not before us. The trial court so found, and its judgment having been unanimously affirmed, we are forbidden by the mandate of the constitution and statute to examine that question.

The additional claim that the sureties did not establish a defense against the appellants, so far as it is dependent upon the presence or absence of evidence, is also concluded by such unanimous decision.

The only other question which can be examined upon this appeal is whether the defense, so far as it is based upon the plaintiff's fraud, was available, it not having been set up in the pleadings. A complete answer to the contention that the plaintiffs' fraud was not sufficiently pleaded is that no exception ³⁰⁵ appears in the record which raises that question. When the evidence upon that subject was offered no objection to the

testimony was interposed upon the ground that the defense was not set up in the answer. Indeed, there seems to have been no objection whatever to that evidence. Consequently, no question of law is raised which this court can decide.

The judgment should be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Vann, Cullen, and Werner, JJ., concur.

MECHANIC'S LIEN.—A JUST AND TRUE ACCOUNT of a mechanic's lien demand is required whether filed by an original contractor or a subcontractor: *Mitchell etc. Mill Co. v. Allison*, 138 Mo. 50, 60 Am. St. Rep. 544, 40 S. W. 118; and for a materialman to recover under the mechanic's lien law, it is essential for him to show that the material was furnished in pursuance of an agreement, express or implied, with the owner or his agent: *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690, 53 N. W. 1039.

YOUNG v. SHULENBERG.

[165 N. Y. 385, 59 N. E. 135.]

EVIDENCE—DECLARATIONS AS TO PEDIGREE.—Declarations of deceased members of a family, made ante litem motam, are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events.

EVIDENCE.—DECLARATIONS CANNOT BE RECEIVED AS EVIDENCE OF PEDIGREE until it is first shown by evidence, independent of the declarations, that the person who made them was a member of the family, and that he is dead, incompetent, or beyond the jurisdiction of the court, but slight proof of the relationship is sufficient.

EVIDENCE AS TO PEDIGREE—RECITALS IN DEED.—When there is a recital by the grantor in a deed over eighty years old that a certain person died intestate and seised of the premises, leaving the grantor and her cognators as his widow and heirs at law, the facts that the family name was identical, that the deed was acknowledged in a foreign country before a minister of the United States thereto, and that the last grantee had custody of the deeds showing title in such intestate by conveyances running back to, and including, the original patent, are, in the absence of rebutting evidence, sufficient to establish that the grantor and her heirs were members of the family, and hence in a position to speak on the subject of pedigree.

EVIDENCE—PRESUMPTIONS—PROOF OF PEDIGREE.—If a deed over eighty years old, executed by a resident of a foreign country, contains recitals by the grantor as to pedigree, the presumption is that the grantor was of full age at the time of acknowledgment, and it must be assumed, in proving the grantor's relationship with the family of the prior owner, that the grantor, if liv-

ing at the time of trial, was beyond the jurisdiction of the court, as continuity of residence is presumed in the absence of evidence, but, owing to the long lapse of time, the presumption is that the grantor was not then alive.

EVIDENCE OF PEDIGREE—PRESUMPTIONS.—Cases of pedigree are peculiar, in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed; and while presumptions "should be weighed with care and applied with caution" in all cases, yet in a case involving a transaction which occurred nearly three generations ago, necessity may compel their use to prevent a failure of justice.

EVIDENCE OF PEDIGREE—PRESUMPTIONS—AID OF, WHEN PROPER.—In an action of trespass for entering upon the lands of the plaintiff and cutting down and carrying away trees therefrom, where the defendant stands before the court as a naked trespasser, unless he can pick some flaw in the plaintiff's title, and where the plaintiff, in establishing title, relies upon proof of pedigree, the difficulty of proof by the party asserting the fact of relationship, as well as the attitude of the party denying it, should be considered and the former aided by resort to presumptions, when supported by strong reasons, where the latter makes no claim to the subject of litigation, but attempts to defend a wrong inflicted upon some one by insisting that it may not have been the plaintiff whom he wronged, but some person unknown.

Trespass. In the trial court there was a judgment for the plaintiff. This was affirmed by the appellate division, and the defendant Shulenberg appealed.

Clark L. Jordan, for the appellant.

Andrew J. Nellis, for the respondent.

386 VANN, J. The complaint charges the defendant with unlawfully entering upon lands of the plaintiff and cutting 387 down and carrying away a large number of trees therefrom. Neither by his answer nor evidence did the defendant claim the right to enter upon the land in question or to cut trees thereon, but he put at issue the entry by himself, as well as the title of the plaintiff. The land upon which the alleged trespass was committed was virgin forest, in the county of Fulton, that had never been so inclosed, cultivated, or used as to constitute an adverse possession: Code Civ. Proc., sec. 370. The plaintiff proved a record title thereto, commencing in 1794, when letters patent were granted by the state of New York, and extending through various mesne conveyances until 1872, when the apparent title vested in William Claflin, of whom in September, 1893, the plaintiff purchased by a contract which imposed upon him the duty of paying the annual taxes, and gave him the privilege of cutting and carrying away timber upon certain conditions. He cut eight thousand or ten thousand logs every year

on the tract, and had such possession only as may be implied from the foregoing facts: *Machin v. Geortner*, 14 Wend. 239; *Hunter v. Starin*, 26 Hun, 529.

• The attack made upon the title by the defendant is that there is no legal evidence to show that Anne Ellice and six others, all residents of England, who, in July, 1817, conveyed two hundred thousand acres, including the locus in quo, in consideration of twenty thousand pounds, were the widow and heirs at law of Alexander Ellice, also a resident of England, who took title from the patentees in 1795. It appeared, however, that the six deeds, constituting the chain of title from the state, had all been recorded, and that they were all in the possession of Mr. Clafin, the last grantee, who kept them together as muniments of his title. It further appeared that the deed of 1817, which was acknowledged in London before the minister of the United States to Great Britain, recited that Alexander Ellice, of London, died intestate and seised of said premises, leaving the grantors as his widow and heirs at law.

Whether Anne Ellice was the widow and her cogrants the heirs at law of Alexander Ellice was a question of pedigree, which, owing to the difficulty of producing living witnesses ³⁸⁸ to prove remote events, is an exception to the rule excluding hearsay evidence. Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence it cannot, in most instances, be proved at all. Hence, declarations of deceased members of a family, made ante litem motam, are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events: *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024; *Jackson v. Cooley*, 8 Johns. 128; *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468; *Jackson v. Russell*, 4 Wend. 543; affirmed, sub nom. *Russell v. Jackson*, 22 Wend. 277; *Greenleaf on Evidence*, 14th ed., secs. 103, 104; *Wharton on Evidence*, 3d ed., sec. 201 et seq.; *Rice on Evidence*, sec. 220. Recitals in an ancient deed, admissible in evidence without proof of contemporaneous possession, may be proved as against persons who are not parties to it and who do not claim under it: *Greenleaf v. Brooklyn etc. Ry. Co.*, 132 N. Y. 408, 30 N. E. 762; *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. Rep. 780; *Deery v. Cray*, 5 Wall. 795; *Doe v. Davies*, 10 Ad. & E. 314; 18 Am. & Eng. Ency. of Law, 263, 266.

Before the declarations can be received, however, as evidence of pedigree, it must appear that the person making them was a member of the family, and that he is dead, incompetent, or beyond the jurisdiction of the court. Therefore, before the declarations of Anne Ellice, as contained in the recital of her deed, could be received in evidence on the question of pedigree, it was necessary for the plaintiff to show that she was a member of the family of Alexander Ellice, and that she could not be produced or testify owing to one of the contingencies named. While the law required that her relationship to the Ellice family should be shown by evidence independent of her own declarations, still, as was recently held in an important case, "but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy": *Fulkerson v. Holmes*, 117 U. S. 389, 397, 6 Sup. Ct. Rep. 780, 784.

The proof of such relationship rested upon the identity of ³⁸⁹ the family name, the certificate of acknowledgment before the United States minister, and the custody by the proper party of the deeds showing title in Alexander Ellice by conveyances running back to and including the original patent. The acknowledgment of a deed from persons describing themselves as heirs, taken before the mayor of London, and the custody of letters patent, were regarded as circumstances of importance in two early cases in this state: *Jackson v. Cooley*, 8 Johns. 128; *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468. We think that the facts stated, together with the further fact that at the time of the trial eighty years had elapsed since the acknowledgment of the deed, were sufficient to establish, in the absence of rebutting evidence, that Anne Ellice and her cograntors were members of the family, and hence in a position to speak on the subject of pedigree. While the evidence was not strong, the difficulty of producing better evidence, owing to the distance between the last known residence of the foreign grantors and the place in which the parties resided and where the trial was had, should not be lost sight of: *Wharton on Evidence*, secs. 204, 216, and cases cited. It was proper also to take into consideration the fact that no adverse claim had ever been made to the land, and that even the defendant made no claim thereto, but stood before the court as a naked trespasser, unless he could pick some flaw in the title of the plaintiff.

As continuity of residence is presumed in the absence of evidence, we must assume that Anne Ellice, if living at the time

of the trial, was beyond the jurisdiction of the court; but owing to the long lapse of time the presumption is that she was not then alive. While existence at an antecedent date gives rise to a presumption of existence at a subsequent date, it continues only for a reasonable period, for it is obvious that a point of time must ultimately be reached when such a presumption must give place to its opposite. As was said by Mr. Justice Field in *Montgomery v. Bevans*, 1 Saw. 653, 667, Fed. Cas. No. 9735: "There must be some period when the presumption of the continuance of life ceases, and the presumption of death supervenes." The death of a person may be presumed to ³⁹⁰ have happened prior to a given date, when it would be contrary to the ordinary course of nature that he should be living at that time: *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698. In *Doe v. Michael*, 17 Ad. & E. 276, Lord Campbell said: "Seeing that the entry bears date more than fifty years before the trial, proof of the death of the person signing it was unnecessary. Under such circumstances, in the absence of evidence to the contrary, it is to be presumed that he is dead." So, Lord Mansfield, in *Rowe v. Hasland*, 1 W. Black. 404, declared that "in establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists." And Lord Ellenborough, in *Doe v. Jesson*, 6 East, 80, 85, referring to the statutes of 19 Charles II, caption 6, and 1 Jacobus I, caption 2, said that "the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living."

Mrs. Ellice acknowledged the deed under consideration in the year 1818, when she is presumed to have been of full age, so that if living at the time of the trial she must have been more than one hundred years old. While such an age is sometimes attained by human beings, it is opposed to the common experience of mankind, and so exceptional as to throw the burden of proof upon the party asserting it. In the absence of evidence, we think it should be presumed that Mrs. Ellice was not living at the time of the trial, the same as various presumptions are indulged in by courts founded upon the course of nature and general observation: *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Oppenheim v. Wolf*, 3 Sand. Ch. 571; *Sheldon v. Ferris*, 45 Barb. 124; *Matter of Ackerman*, 2 Redf. Sur. 521; *Allen v. Lyons*, 2 Wash.

C. C. 475; Fed. Cas. No. 227; *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310; *Thomas v. Visitors of Frederick Co. School*, 7 Gill & J. 369.

Cases of pedigree are peculiar in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed: 1 Best on Evidence, 411. While presumptions "should be weighed with care and applied with caution" in all cases, in a case involving a transaction which occurred nearly three generations ago, necessity may compel their use in order to prevent a failure of justice. The difficulty of proof by the party asserting the fact, as well as the attitude of the party denying it, should be considered and the former aided by resort to presumptions, when supported by strong reasons, where the latter makes no claim to the subject of litigation, but attempts to defend a wrong inflicted upon some one by insisting that it may not have been the plaintiff whom he wronged, but some person unknown.

We think the plaintiff established a right to recover by evidence which was competent under the circumstances of the case, and, after examining all the exceptions, we affirm the judgment appealed from, with costs.

Parker, C. J., Bartlett, Haight, Martin, Cullen, and Werner, JJ., concur.

EVIDENCE OF PEDIGREE.—Hearsay in the family and among relations, tradition, and anything showing general reputation may be admitted as evidence of pedigree: *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468; *Vaughan v. Phebe*, 1 Mart. & Y. 1, 17 Am. Dec. 770. Hearsay evidence of pedigree is admissible only where the fact is ancient, and better evidence is not attainable: *Birney v. Hann*, 3 A. K. Marsh. 322, 13 Am. Dec. 167. The rule which admits hearsay evidence of the pedigree of a person is restricted to the declarations of deceased persons who were related to him by blood or marriage: *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. 682; *Chapman v. Chapman*, 2 Conn. 347, 7 Am. Dec. 277; but it is sufficient that the declarant be connected by extrinsic evidence with one branch of the family touching which the declaration is tendered: *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323. The term "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the time when these events happen: *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323.

SINNOTT v. FEIOCK.

[165 N. Y. 444, 59 N. E. 265.]

REPLEVIN AGAINST ONE WHO HAS LOST POSSESSION.—If a vendee fraudulently purchases certain chattels, he is not answerable in an action of replevin for their recovery, where, prior to a demand for their return, and before the commencement of the action, they are taken from him by process legal as to him, such as a writ of execution, and not by any voluntary act on his part.

Frank J. Hone and Thomas Bracken, for the appellant.

Charles E. Bostwick, for the respondent.

445 CULLEN, J. The action is in replevin to recover certain chattels which it was alleged the plaintiff was induced to sell to the respondent by fraud on the part of the latter. The complaint was in the ordinary form, and averred property in the plaintiff and that the defendant wrongfully took and detained the chattels. The complaint was dismissed on the opening of the plaintiff's counsel and his concession (apparently made for the purpose of obtaining a ruling on the question) that prior to a demand for the return of the goods and before the commencement of the action, the chattels had been taken from the defendant on an execution against him and sold, so that at the time of such demand and commencement of the action they were not in the defendant's possession, custody, or control. On this concession the trial court dismissed the complaint and the judgment entered on such dismissal has been affirmed by the appellate division.

There was no suggestion made that the defendant obtained the property with the intention that it should be seized on execution or in pursuance of any conspiracy or collusion with the execution creditor. The sale was not void, but voidable at the election of the plaintiff. At the time the chattels were seized on execution the plaintiff had not rescinded the sale, and whatever were the plaintiff's rights, the seizure of the goods as to the defendant was lawful, and he could not resist or avoid it. The question presented, therefore, is whether the defendant is liable in an action of replevin for the recovery of the chattels after they have been taken from him by process legal as to him and not by any voluntary act on his part. The determination of this question requires an examination and consideration of this particular form of action as it now exists under our code and statutes.

Originally, at common law, the action of replevin lay to recover the possession of goods illegally distrained by a landlord. The primary object of the action was to recover possession of the specific chattels. The form of action was so useful that the action was extended to nearly all cases of unlawful caption or detention of chattels where it was ⁴⁴⁶ sought to recover the chattels in specie. In many cases where the plaintiff was unable to obtain the return of the chattels he could recover in the action their value. Still, the action remained essentially one to recover the possession of chattels as distinguished from actions in trespass or trover to recover damages for the seizure or for the value of the property. There were many technical rules in force relating to this form of action, which at times made proceedings under it difficult, and in 1788 a statute was passed in this state (1 Rev. Laws 1813, p. 31) to simplify the procedure. It directed the form of plaint before the sheriff in which the plea was "of taking and unjustly detaining" beasts, goods, or chattels. Afterward the Revised Statutes prescribed the rules governing actions of replevin and the procedure therein: Rev. Stats., tit. 12, c. 8, pt. 3. In the original note of the revisers is stated their intention to so extend the action of replevin "as to make it a substitute for detinue, and a concurrent remedy in all cases of the unlawful caption or detention of personal property, with trespass and trover." We do not think the revisers used the term "concurrent" as meaning "coextensive," for by section 6, title 12, it is provided that the action shall in all cases be commenced by writ, the form of which is prescribed as follows: "Whereas A B complains that C D has taken, and does unjustly detain (or, 'does unjustly detain,' as the case may be)." The execution in the action required the sheriff to replevin the goods if they could be found and deliver them to the plaintiff, and, in case they could not be obtained, to collect their value with the damages and costs from the property of the defendant. The provisions of chapter 2 of title 7 of the Code of Procedure of 1848, entitled "Claim and Delivery of Personal Property," operated as a substitute for those of the Revised Statutes. They direct that at the commencement of the action the plaintiff may replevy the chattels, but in the affidavit to obtain the writ there is required the statement that the defendant "unjustly detains" them. The provisions of the present Code of Civil Procedure, in the article entitled "Action to Recover a Chattel" ⁴⁴⁷ (Code Civ. Proc., secs. 1689-1730), are substantially the same as those of the old code.

The question several times arose under the Code of Procedure whether replevin could be maintained against a party who was not in possession, either actual or constructive, of the chattels, and was the subject of conflicting decisions in the supreme court and in the superior court of New York. It finally came to this court in *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259. This was also a case of fraudulent purchase of goods in which the defendant, before the action was brought, had voluntarily transferred the goods to his assignee. It was held that the action could be maintained. This decision was based on the authority of two English cases—*Garth v. Howard*, 5 Car. & P. 346, and *Jones v. Dowle*, 9 Mees. & W. 19. In the case in this court Judge Selden wrote: "The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention." This doctrine has been steadily adhered to by this court: *Barnett v. Selling*, 70 N. Y. 492; *Dunham v. Troy Union R. R. Co.*, 3 Keyes, 543. These decisions, however, do not control the present case. They are authorities to the effect that where the defendant has wrongfully parted with possession, the action will lie. As already stated, the defendant did not part with possession by any act on his part, but the property was taken from him by process of law valid as to him and which he could not resist. To uphold a recovery in replevin under such circumstances, we must go further, and decide that whenever property has been taken or obtained wrongfully an action of replevin may be maintained against the taker, regardless of whether the property is in his possession ⁴⁴⁸ or whether he has been lawfully deprived of it, and, as a logical sequence, as we think, also regardless of the fact that the property sought to be replevined may have ceased to exist without fault on the defendant's part; in other words, that the action can be maintained under all circumstances to the same extent as an action for conversion. Such a doctrine would substantially destroy the characteristics of an action of replevin which distinguish it as an action to recover possession of specific property, and we find no authority

for it in the decisions of this or of our sister states. In Massachusetts the rule seems absolute that the defendant must be in possession when the action of replevin is brought: *Richardson v. Reed*, 4 Gray, 441, 64 Am. Dec. 77; *Hall v. White*, 106 Mass. 599. In the earlier case it is said: "By the common law replevin cannot be maintained where trespass cannot; for, by that law, an unlawful taking of goods is a prerequisite to the maintenance of replevin. But trespass will lie in cases where replevin will not. Replevin, being an action in which the process is partly in rem, will not lie where it is impracticable or unlawful to execute that part of the process according to the precept." In the later case it was held that the action would not lie against a sheriff who had seized goods but parted with possession before the date of the plaintiff's writ. The same rule obtains in New Hampshire: *Mitchell v. Roberts*, 50 N. H. 486; Iowa: *Coffin v. Gephart*, 18 Iowa, 256; Missouri: *Feder v. Abrahams*, 28 Mo. App. 454; *Davis v. Randolph*, 3 Mo. App. 454; Maine: *Howe v. Shaw*, 56 Me. 291; Minnesota: *Ames v. Mississippi Boom Co.*, 8 Minn. 467; and in North Carolina: *Haughton v. Newberry*, 69 N. C. 456. In Michigan, the statute as to procedure in replevin is similar to our own, and in *McBrien v. Morrison*, 55 Mich. 351, 21 N. W. 368, the supreme court of that state, following the rule in *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259, held that the action lay, despite a wrongful transfer by the defendant prior to its institution. In the subsequent case of *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153, it is said: "The nature of the remedy, the detention being the gist of the action and the delivery of the goods its object, forbids this action against one ⁴⁴⁹ not in possession and who cannot deliver the property unless he has concealed, removed, or disposed of the same with the intent of avoiding the writ." Accordingly, it was held that replevin would not lie against a pledgee who had improperly sold the pledge and parted with possession. With us it is sufficient that the defendant has voluntarily disposed of the property, though without intent to avoid the writ: *Barnett v. Selling*, 70 N. Y. 492. In Wisconsin, though a decision on the exact point seems wanting, the dicta of the opinions indicate the rule to be the same as that in this state. In Virginia there is a very early case on the subject (*Burnley v. Lambert*, 1 Wash. (Va.) 308) argued by Mr. (afterward Justice) Washington and Mr. (afterward Chief Justice) Marshall. It was there held that the defendant could not, by transferring the property before the commencement of the action, defeat the

writ. In the opinion it is said that: "Possession of the defendant prior to the suit was sufficient to charge him unless he was legally evicted." In *Pool v. Adkisson*, 1 Dana, 110, the court of appeals of Kentucky, following the decision in *Burnley v. Lambert*, 1 Wash. (Va.) 308, held that the voluntary transfer of the defendant before suit did not defeat an action in replevin. It is there said: "According to the case of *Burnley v. Lambert*, 1 Wash. (Va.) 308, the fact that the plaintiff was not possessed of the slaves when this suit was brought cannot change or affect the remedy, unless he had been 'legally evicted.' This doctrine, if interpreted literally, may be too restrictive. But it seems to be free from just exception, if understood, as we suppose it ought to be, to mean that the plaintiff had been divested of the possession in a manner authorized by law, and which would, therefore, exonerate him from the charge of tortious conduct." It was held by the same court, in *Caldwell v. Fenwick*, 2 Dana, 333, that detinue could not be maintained for a slave dead before the commencement of the action, though otherwise if he had died subsequent to the commencement of the action, or the defendant had improperly parted with his possession. The court said: "Detinue is a mode of action given for the recovery of a specific thing and damages ⁴⁵⁰ for its detention, though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing cannot be had; yet the recovery of the thing itself is the main object and inducement to the allowance of the action. . . . The action is not adapted to the recovery alone of the value of a thing detained, nor can it be maintained therefor."

We have thus reviewed the leading cases in this country in reference to the circumstances under which an action of replevin can be maintained. None of them authorizes the maintenance of the action under the circumstances of the present case. In all of them replevin is held to be essentially a possessory action. In many of the states it is unqualifiedly requisite for the maintenance of the action that the defendant should be in possession of the chattels sued for at the time the action was commenced. In others, as in our own state, an exception is made to the general rule where the defendant has voluntarily parted with the property. Still the exception goes only to the extent stated. The law in Virginia and Kentucky is substantially the same as our own, and the cases cited from those states are well reasoned on principle. The case at bar falls within the rule stated in those cases, that where the defendant is evicted

by legal process before suit brought the action will not lie, and we are, therefore, of opinion the disposition of the case by the courts below was correct. We have not overlooked the decision in *Devoe v. Brandt*, 53 N. Y. 462. In that case Samuels, the vendee, from whom the goods had been taken on execution, did not defend the action, and the question we have discussed did not arise. The action was unquestionably well brought against the other defendant, as he was in possession of the chattels at the time of the commencement of the suit.

It is urged that whatever may have been originally the nature and character of an action of replevin, there is now no longer reason for maintaining a distinction between it and an action for conversion, and that it would conduce greatly to the speedy administration of justice to permit the use of the first form of action as a substitute for the second. A good ⁴⁵¹ deal may be said in favor of this claim, great as would be the innovation resulting in its acceptance. There is, however, a serious objection to adopting this view of an action of replevin. If a defendant is arrested in an action to recover a chattel, he can be discharged only upon giving a bond for the return of the chattel or the full payment of any judgment that may be recovered against him; while in an action for conversion the bond is conditioned only for his personal surrender to any mandate or final judgment against him: Code Civ. Proc., sec. 575. The form of the action, therefore, seriously affects the rights of the defendant against whom it is brought. While this consideration should not induce us to limit the scope of an action of replevin except within the bounds prescribed by statute and the authorities, it may well restrain us from taking any radical departure in the law.

The judgment appealed from should be affirmed, with costs.

Parker, C. J., Gray, Bartlett, Martin, Vann, and Werner, JJ., concur.

When Replevin or Claim and Delivery is Sustainable.*

General Features of the Remedy.—At common law, detinue was the remedy for the recovery of personal property, unlawfully detained,

*REFERENCES TO MONOGRAPHIC NOTES.

Action for possession of chattels levied upon under execution: 20 Am. Dec. 696-699. Actions in which the title to real estate may not be tried or questioned: 89 Am. Dec. 47-436.

Mortgagee's rights and remedies against impairment of the value of his security: 43 Am. St. Rep. 432-436.

Owner of chattel cannot be divested of title without his consent: 3 Am. St. Rep. 196-206.

Property in dogs and the remedies for its enforcement: 65 Am. St. Rep. 288-299. Remedies for injuries to real estate held adversely to the plaintiff: 85 Am. Dec. 321-327.

Replevin against officer: 25 Am. St. Rep. 256-259.

but it is now little used. The action of replevin at common law was originally of a more limited character. It lay to recover back property illegally distrained; but it afterward came into use in all cases where personal property was illegally taken. The two actions of detinue, for unlawful detentions, and replevin, for unlawful takings, thus came to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned: *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486; *Maxham v. Day*, 16 Gray, 213, 77 Am. Dec. 409. Replevin, at the common law, is founded on the wrongful taking of personal property, and is a remedy by which the person from whom goods or chattels are taken may be restored to the possession of them until the question of title can be judicially tried and determined: *Maxham v. Day*, 16 Gray, 213, 77 Am. Dec. 409. To support replevin under the common law an unlawful taking was necessary; an unlawful detention was not enough: *Mennie v. Blake*, 6 El. & B. 842; *Harwood v. Smethurst*, 29 N. J. L. 195, 80 Am. Dec. 207; *Wheelock v. Cozzens*, 6 How. (Miss.) 279; *Cummings v. MacGill*, 2 Murph. 357; but the law of the remedy has been so changed by force of statutes and otherwise that replevin now lies in this country for a wrongful detention as well as for a wrongful taking. In other words, an unlawful detention alone, without an unlawful taking, will support replevin: *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501; *Dearmon v. Blackburn*, 1 Sneed, 390, 60 Am. Dec. 160; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Skinner v. Stouse*, 4 Mo. 93; *Schlessinger v. Cook* (Wyo., Sept. 1900), 62 Pac. 152; *Pirani v. Barden*, 5 Ark. 81, 84; *Trapnall v. Hattier*, 6 Ark. 18. Either a wrongful detention or a wrongful taking is sufficient to maintain an action of replevin: *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555; and a wrongful detention is enough, though the original taking may have been justifiable: *Baker v. Fales*, 16 Mass. 147; or sufficient, though there was no actual taking by anyone from the plaintiff: *Skinner v. Stouse*, 4 Mo. 93.

In some of the states replevin is confined to cases of wrongful distress: *Hewitson v. Hunt*, 8 Rich. 106; *Dearmon v. Blackburn*, 1 Sneed, 390, 60 Am. Dec. 160; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Vaiden v. Rell*, 3 Rand. 448; and in West Virginia the action has been abolished by statute: Note to *Kellogg v. Churchill*, 9 Am. Dec. 107, discussing replevin against an officer for goods levied upon by him; but in a majority of the states replevin is not confined to cases of distress: *Caldwell v. West*, 21 N. J. Eq. 411; *Pangburn v. Patridge*, 7 Johns. 140, 5 Am. Dec. 250; *Daggett v. Robins*, 2 Blackf. 415, 21 Am. Dec. 752. The action lies where property has been unlawfully taken or is unlawfully detained: *Helman v. With-*

ers, 3 Ind. App. 532, 50 Am. St. Rep. 295, 30 N. E. 5; *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Allen v. Crary*, 10 Wend. 349, 25 Am. Dec. 566; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Daggett v. Robins*, 2 Blackf. 415, 21 Am. Dec. 752; *Pangburn v. Patridge*, 7 Johns. 140, 5 Am. Dec. 250. In Pennsylvania, replevin lies wherever one claims goods in the possession of another, without regard to the manner in which the possession was obtained: *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; and regardless of the fact as to whether the claimant has ever had possession or not: *Ferguson v. Lauterstein*, 160 Pa. St. 427, 28 Atl. 852. Replevin lies wherever trespass de bonis asportatis would lie: *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684; *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593; *Allen v. Crary*, 10 Wend. 349, 25 Am. Dec. 566; *Phillips v. Harriss*, 3 J. J. Marsh. 122, 19 Am. Dec. 166; but a wrongful taking from the actual or constructive possession of the plaintiff is necessary to support trespass or replevin in the cepit: *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463. Replevin, trespass, and trover, without demand, are concurrent remedies for a wrongful taking of goods: *Stanley v. Gaylord*, 1 Cush. 536, 48 Am. Dec. 643; *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296; *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; and see *Brewster v. Carmichael*, 39 Wis. 456, 461; but as replevin lies where property is unlawfully detained, the gist of the action is the unlawful detention of the property at the inception of the suit, and the rights of the parties with respect to possession of the property at the time, whether there has been a wrongful taking or not: *Shreck v. Gilbert*, 52 Neb. 813, 73 N. W. 276; *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482. Delivery of the property in replevin is the primary object of the action. The value is to be recovered in lieu of it only in case a delivery of the specific property cannot be had: *Swantz v. Pillow*, 50 Ark. 300, 7 Am. St. Rep. 98, 7 S. W. 167. Replevin is a possessory action and does not necessarily determine title, but merely the right to possession. It may fail either because the plaintiff shows no right of possession, or because the defendant is shown not to have wrongfully withheld; and it may fail for lack of demand in some cases as well as for lack of substantial right: *Pearl v. Garlock*, 61 Mich. 419, 1 Am. St. Rep. 603, 28 N. W. 155.

The action of detinue exists in a few of the states: *Walker v. Louisville etc. R. R. Co.*, 111 Ala. 233, 20 South. 358; *Kilpatrick v. Harper*, 119 Ala. 452, 24 South. 715; *Morningstar v. Stratton*, 121 Ala. 437, 25 South. 573; *Adler v. Prestwood*, 122 Ala. 367, 24 South. 999; *Nelson v. Howison*, 122 Ala. 573, 25 South. 21; *Thomason v. Silvey*, 123 Ala. 694, 26 South. 644; *Robb v. Cherry*, 98 Tenn. 72,

38 S. W. 412; *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Robinson v. Woodford*, 37 W. Va. 377, 16 S. E. 602; *Good v. Good*, 39 W. Va. 357, 19 S. E. 382. In an action of detinue, as in replevin, the plaintiff must have, at the commencement of the suit, a general or special property in the subject matter, and the right to its immediate possession: *Robb v. Cherry*, 98 Tenn. 72, 38 S. W. 412. But the whole ground of detinue and replevin is covered in some of the states by a code provision for the recovery of personal property: *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486; *Helman v. Withers*, 3 Ind. App. 522, 50 Am. St. Rep. 295, 30 N. E. 5. Thus, the Indiana code gives an action for the recovery of the possession of personal property which has been wrongfully taken or is unlawfully detained: *Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501. An action of "claim and delivery" is governed, in the main, by the same rules as the action of replevin: *Berthold v. Holman*, 12 Minn. 335, 93 Am. Dec. 234. The common-law distinction between replevin and detinue has been abolished by the code of South Dakota. In that state the action to recover personal property takes the place of, and is a substitute for, both the former actions of replevin and detinue: *Willis v. De Witt*, 3 S. Dak. 281, 52 N. W. 1090. The provisional remedy in replevin, under the statute of Wisconsin, to obtain "immediate" possession of the subject in controversy, is not essential to the commencement or maintenance of the action to recover the possession of the property: *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599. In actions for the recovery of personal property, where its immediate delivery is sought, the statute of North Carolina gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer, unless it has been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, even though such a course results in the obstruction of the process of the courts to the extent of having tried the title to personal property claimed by a third person, where the same has been levied upon or seized under execution or attachment not against the property of the plaintiff: *Mitchell v. Sims*, 124 N. C. 411, 32 S. E. 735.

The Necessary Possession of Defendant, and Plaintiff's Right to Possession.—To sustain replevin, the defendant must have actual or constructive possession or control of the property in controversy at the commencement of the action, whether he is an officer or a private individual: *Eales v. Francis*, 115 Mich. 636, 73 N. W. 894; *Reid v. Ferris*, 112 Mich. 693, 67 Am. St. Rep. 437, 71 N. W. 484; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153; *Tozier v. Merriam*, 12 Minn. 387; *Feder v. Abrahams*, 28 Mo. App. 454; *Penn v. Brashear*, 65 Mo. App. 24; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355; *Depriest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Irwin v. Walling*, 4 Okla. 128, 44 Pac. 219; *Alaske etc. Verein v. Wall*, 58 N. Y. Supp. 1115,

28 Misc. Rep. 174; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829; except when it has been fraudulently disposed of or concealed to avoid the writ: *Reid v. Ferris*, 112 Mich. 693, 67 Am. St. Rep. 437, 71 N. W. 484; *Starke v. Paine*, 85 Wis. 633, 55 N. W. 185; *Depriest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Gildas v. Crosby*, 61 Mich. 413, 28 N. W. 153. The same rule applies to an action of "claim and delivery" of personal property: *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240; *McCormick etc. Machine Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939; or an action for the recovery of personal property: *Willis v. De Witt*, 3 S. Dak. 281, 52 N. W. 1090. Such actions run against the party in possession: *Irwin v. Walling*, 4 Okla. 128, 44 Pac. 219; and can be maintained for only such property as is in the actual or constructive possession of the defendant when suit is brought: *McCormick etc. Machine Co. v. Woulph*, 11 S. Dak. 252, 76 N. W. 939. If a sheriff levies a writ of attachment upon property, and does not haul it away from the place where he levies upon it, but does forbid persons claiming the right of possession from touching or removing it, and then places the property in charge of a person as his representative, he thereby acquires such possession as will make him subject to an action of replevin: *Aman v. Mottweiler*, 15 Ind. App. 405, 44 N. E. 63.

To sustain replevin for personal property, the plaintiff must not only show some interest thereto in himself, either general or special, but he must be entitled to the immediate possession thereof: *Carpenter v. Glass*, 67 Ark. 135, 53 S. W. 678; *Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282; *Updyke v. Wheeler*, 37 Mo. App. 680; *Kavanaugh v. Brodball*, 40 Neb. 875, 59 N. W. 517; *Morse v. Hamill*, 97 Iowa, 631, 66 N. W. 892; *Alden v. Carver*, 13 Iowa, 253, 81 Am. Dec. 430; *Nichols v. Kautson*, 62 Minn. 237, 64 N. W. 391; *Chambers v. Hunt*, 3 Harr. (N. J.) 339; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441, 40 Am. Dec. 198. The cardinal question in every action of replevin is, whether the plaintiff therein was entitled to the immediate possession of the property in controversy at the commencement of the action: *Kavanaugh v. Brodball*, 40 Neb. 875, 59 N. W. 517; *Alden v. Carver*, 13 Iowa, 253, 81 Am. Dec. 430; *Peterson v. Lodwick*, 44 Neb. 771, 62 N. W. 1100; *Shreck v. Gilbert*, 52 Neb. 813, 73 N. W. 276; *Waterhouse v. Black*, 87 Iowa, 317, 54 N. W. 342; *Chambers v. Hunt*, 3 Harr. (N. J.) 339. So, to maintain an action of claim and delivery, the plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of the action: *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648. It may be stated, as a general rule, that replevin lies, in any case, where the plaintiff has a present right of possession of personal property in the defendant's possession: *Shaddon v. Knott*, 2 Swan, 358, 58 Am. Dec. 63; *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *United States Exp. Co. v. Hammer*, 21 Ind. App. 186,

61 N. E. 953; *Boyle v. Rankin*, 22 Pa. St. 168; *Ketcham v. Barse etc. Com. Co.*, 57 Kan. 771, 48 Pac. 29; *Starke v. Paine*, 85 Wis. 633, 55 N. W. 185; *Cartwright v. Smith*, 104 Tenn. 689, 58 S. W. 331; and claim and delivery is sustainable in such a case: *Church v. Foley*, 10 S. Dak. 74, 71 N. W. 759. Bare possession of property by a plaintiff is enough to support replevin against a trespasser: *Updyke v. Wheeler*, 37 Mo. App. 630; *Dederick v. Brandt*, 16 Ind. App. 264, 44 N. E. 1010; though it was wrongfully obtained: *Anderson v. Gouldberg*, 51 Minn. 294, 53 N. W. 636.

A plaintiff in replevin must show an unlawful taking or unlawful detention of the property in question: *Simpson v. McFarland*, 18 Pick. 427, 29 Am. Dec. 602; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Baker v. Fales*, 16 Mass. 147; *Marston v. Baldwin*, 17 Mass. 606; but the constructive possession of goods, by one having the general property in them, and a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin: *Haythorn v. Rushforth*, 4 Harr. (N. J.) 160, 38 Am. Dec. 540. An equitable title to chattels will support an action of replevin: *Carter v. Long*, 26 Can. S. C. 430; and one having a special interest in goods may maintain replevin against an officer who afterward attaches them upon a writ against the general owner: *First Nat. Bank v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92. Replevin may be maintained by one having a right of possession, whether he has ever had possession or not, and whether his property in the goods is absolute or qualified: *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *Ferguson v. Lauterstein*, 160 Pa. St. 427, 28 Atl. 852; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684. A plaintiff in replevin must recover on the strength of his own right to the property in controversy, and not upon the weakness of his adversary's right or the latter's want of right: *Preston v. Peterson*, 107 Iowa, 244, 77 N. W. 864; *Kavanaugh v. Brodball*, 40 Neb. 875, 59 N. W. 517; *Keniston v. Stevens*, 66 Vt. 351, 29 Atl. 312; *Herman v. Kneipp*, 59 Neb. 208, 80 N. W. 816; *Leete v. State Bank*, 141 Mo. 584, 42 S. W. 927; *Iowa State Nat. Bank v. Taylor*, 98 Iowa, 631, 67 N. W. 677. It is no objection to the plaintiff's suit in replevin that his right of action was not perfected before the issuing of the writ, if it became so before service: *Howard v. Bartlett*, 70 Vt. 314, 40 Atl. 825; and his right to recover is not affected by his assignment, pending the suit, of his interest in the subject matter of the suit, and of the right to prosecute the cause in his own name: *Wall v. De Mitkiewicz*, 9 App. D. C. 109, 123.

Parties Plaintiff.—An administrator may sustain an action for the recovery of notes belonging to his decedent's estate: *McAfee v. Montgomery*, 21 Ind. App. 196, 51 N. E. 957; and replevin is sustainable by him to recover from the widow of the decedent a piano leased to the decedent at an agreed monthly rental, with an option to purchase it on the terms stated, where the administrator pays the balance of the rent due, and the sum required to purchase the

instrument, and receives a bill of sale from the lessor: *Powell v. Eckler*, 96 Mich. 538, 56 N. W. 1. The assignee of the buyer of a chattel who has never had possession may maintain replevin against the seller: *Woods v. Nixon*, Addis. 131, 1 Am. Dec. 364. So, the pledgee of a chattel mortgage of crops, by the terms of which the mortgagee is entitled to the immediate possession of the property when harvested, may sustain replevin for a portion of the crops retained by the mortgagors: *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414. And if a debtor in failing circumstances makes a chattel mortgage in fraud of his creditors, and afterward makes an assignment for their benefit, his assignee can sustain an action to recover the property thus fraudulently transferred: *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999.

A bailee of property holding possession for the rightful owner can sustain replevin therefor: *Pallen v. Bogy*, 78 Mo. App. 88. He may maintain the action against all persons except the true owner, and even against him if he has a lien for services, advances, etc.: *Sowden v. Kessler*, 76 Mo. App. 581. One who buys property in good faith from an attachment debtor before the levy of the attachment can sustain replevin therefor: *Vanderhoof v. Prendergast*, 94 Mich. 18, 53 N. W. 792.

A creditor of a pledgor who, with the consent and subject to the rights of the pledgee, attaches the property pledged, can maintain his possession in a replevin suit against one whose lien is subordinate to that of the pledgee, without regard to the validity of the attachment: *Farr v. Kilgour*, 117 Mich. 227, 75 N. W. 457. A corporation, which is an indorsee on a promissory note, secured by a chattel mortgage, may sustain replevin against officers and others, who have seized the mortgaged property: *Ketcham v. Barse etc. Com. Co.*, 57 Kan. 771, 48 Pac. 29. A creditor in possession of a debtor's property to secure himself may replevy it, against an officer seizing it under process against the debtor: *Smith v. Maberry*, 61 Ark. 515, 33 S. W. 1068; and a special constable who seizes property on attachment may replevy it from one who wrongfully obtains possession thereof: *Jetton v. Tobey*, 62 Ark. 84, 34 S. W. 531.

The head of a family who has invested a part of the proceeds of exempt property in a piano may replevy the instrument from a wrongdoer: *McDuffie v. Irvine*, 91 Ga. 748, 17 S. E. 1028.

A landlord may bring replevin for chattels wrongfully severed from the freehold by a tenant: *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318; or he may bring an action of claim and delivery for the possession of crops, the title to which has been vested in him, even for an undivided portion thereof: *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728, or for the possession of the crops before they are fully harvested: *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931.

A chattel mortgagee may replevy chattels where the mortgage gives him a right, upon the default of the mortgagor, to their possession, and they are wrongfully detained: *Flinn v. Ferry*, 127 Cal.

648, 60 Pac. 434; *Cartwright v. Smith*, 104 Tenn. 689, 58 S. W. 331. If a chattel mortgagee is entitled to possession, under the terms of the mortgage, whenever he deems himself insecure, he can sustain replevin against an officer who seizes the mortgaged property under execution, without first paying, tendering, or depositing the amount due on the mortgage, as required by statute: *Coughran v. Sundback*, 9 S. Dak. 483, 70 N. W. 644. If a chattel mortgage gives the mortgagee a right to possession whenever he deems himself insecure, the mortgagee may replevy the property before the mortgage is due, where the property has been levied upon by an officer: *Rosenfield v. Case*, 87 Mich. 295, 49 N. W. 630. A chattel mortgagee, in Michigan, can sustain replevin against an officer, who attaches the property in the hands of the mortgagor, upon proper demand and refusal: *Wood v. Weimar*, 104 U. S. 786. An action of replevin, or of claim and delivery, can be sustained by a mortgagee of personal property against an officer who, under process in a suit against the mortgagor, levies upon and takes the property in defiance of the terms of the mortgage: *Merrill v. Denton*, 73 Mich. 628, 41 N. W. 823; *Rankine v. Greer*, 38 Kan. 343, 5 Am. St. Rep. 751, 16 Pac. 680. A chattel mortgagee having a first lien and entitled to possession can sustain claim and delivery for the mortgaged property delivered to a third person: *Browning v. Porter*, 116 N. C. 62, 20 S. E. 961; and a plaintiff in replevin who has a special interest in personal property mortgaged to him, and who is entitled to its possession, can sustain his suit, notwithstanding the mortgage, where it is made to appear that his right to possession is not dependent upon his title as mortgagee: *Brookman v. State Ins. Co.*, 15 Wash. 29, 45 Pac. 655, 46 Pac. 243. A chattel mortgagee to whom the mortgaged property has been delivered can sustain claim and delivery for its wrongful taking by a third person: *O'Neill v. Whitcomb* (Idaho, April, 1893), 32 Pac. 1133. So, a chattel mortgagee, after the mortgagor's refusal to surrender possession of articles covered by the mortgage, and to the possession of which the mortgagee is entitled, may sustain replevin therefor, or a part thereof: *Kiser v. Blanton*, 123 N. C. 400, 31 S. E. 878; *Sink v. Loflin*, 76 Mo. App. 463; and a chattel mortgagee's agent in possession has sufficient interest to sustain replevin, at least as against a wrongdoer or person having no title to, or interest in, the property mortgaged: *Ditto v. Pease*, 82 Ill. App. 192. One of several chattel mortgagees can sustain a separate action to recover the possession of the mortgaged property from a wrongful taker thereof: *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713, 79 N. W. 728; and one of several chattel mortgagees may sustain replevin to protect himself from loss: *Watson v. Mead*, 98 Mich. 330, 57 N. W. 181. Compare the monographic note to *Webber v. Ramsey*, 43 Am. St. Rep. 435, discussing replevin as one of the mortgagee's rights and remedies against impairment of the value of his security.

One who holds a lien on personal property with a right to take possession upon the happening of a certain event, as in case of default in making payment therefor, can sustain replevin for it: *Dows v. Rush*, 28 Barb. 157, 187; *Sutherland v. Brace*, 71 Fed. 469, 73 Fed. 624. A lien given by the maritime law for salvage may be recognized and protected by a common-law court, in replevin by the owner of the res against the salvor, without proof of a request or promise to pay: *Baker v. Hoag*, 7 N. Y. 555, 59 Am. Dec. 431. And a lessor of a newspaper who, in case of a breach of the lease, has the right of immediate possession can maintain replevin against a creditor of the lessee who levies upon the leased property as the property of the lessee: *Warren v. Gutches*, 71 Mich. 407, 39 N. W. 476.

A wife may replevy personal property given her by her husband before marriage and taken away by him upon leaving her: *Loyd v. Loyd*, 113 N. C. 186, 18 S. E. 200; and she may sustain an action to recover her horse sold by her husband: *Lafargue v. Markley*, 55 Ark. 423, 18 S. W. 542. So, if a husband gives his wife's property away to a third person, to suppress a criminal prosecution against himself, and which is carried away without the wife's consent, she may recover her possession by a possessory warrant: *Harris v. Webb*, 101 Ga. 84, 28 S. E. 620.

A purchaser, after performing conditions entitling him to property, may recover it by replevin: *Sutherland v. Brace*, 71 Fed. 469, 73 Fed. 624. A consignee of goods may replevy them from a carrier if there is a negligent delay in delivering them: *Moran v. Northern Pac. R. R. Co.*, 19 Wash. 266, 53 Pac. 49. A county treasurer may replevy property subject to a tax lien: *Reynolds v. Fisher*, 43 Neb. 172, 61 N. W. 695. A licensee to cut standing timber may, upon its severance by a trespasser, maintain replevin against the latter for the timber so severed by him: *Keystone Lumber Co. v. Kolman*, 94 Wis. 465, 59 Am. St. Rep. 905, 69 N. W. 165. A road supervisor can sustain replevin to obtain the possession of animals impounded by him, but which have escaped, and come into the owner's possession: *McManaway v. Crispin*, 22 Ind. App. 368, 53 N. E. 840. A tenant may replevy property wrongfully seized from him by attachment to satisfy a landlord's lien for rent: *Mills v. Pryor*, 65 Ark. 214, 45 S. W. 350; and a principal whose goods in the hands of his agent are wrongfully seized by a sheriff under an execution against the agent may replevy them from the sheriff: *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302. A partner having, under a contract with his copartner, the title to an entire crop of grain, may sustain claim and delivery therefor against the copartner: *Buffkins v. Eason*, 112 N. C. 162, 16 S. E. 916. The holder of a note, where he is the real party in interest with respect to it and a chattel mortgage securing it, may sustain replevin against an officer who wrongfully levies on the chattels on execution against the mortgagor: *Coughran v. Sundback*, 9 S. Dak. 483, 70 N. W. 644.

And a wife can sustain replevin against an attaching officer for wood belonging to her, but wrongfully attached as the property of her husband: *Ayer v. Bartlett*, 170 Mass. 142, 49 N. E. 82.

If one sells personal property conditionally, reserving title in himself and the right to take possession in default of payment, the seller can sustain replevin for the property when the buyer makes such default: *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *McPherson v. Acme Lumber Co.*, 70 Miss. 649, 12 South. 857; *Standard Implement Co. v. Parlin etc. Co.*, 51 Kan. 544, 33 Pac. 360; *Peck v. Bonewright*, 75 Iowa, 98, 39 N. W. 213; *Canadian Typograph Co. v. Macgurn*, 119 Mich. 533, 78 N. W. 542; *Campbell etc. Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 44 Am. St. Rep. 410, 29 Atl. 681; *Cottrell etc. Co. v. Carter*, 173 Mass. 155, 53 N. E. 375; *Wadleigh v. Buckingham*, 80 Wis. 230, 49 N. W. 745; *Hyland v. Bohn Mfg. Co.*, 92 Wis. 157, 65 N. W. 157; without a previous demand: *Peck v. Bonewright*, 75 Iowa, 98, 39 N. W. 213; and the seller may sustain his action, in case of default, against one to whom the buyer has mortgaged the property, the mortgagee having possession thereof: *Standard Implement Co. v. Parlin etc. Co.*, 51 Kan. 544, 33 Pac. 360; or against the assignee of such a mortgagee: *Cottrell etc. Co. v. Carter*, 173 Mass. 155, 53 N. E. 375; or against the buyer's assignee for the benefit of creditors: *Wadleigh v. Buckingham*, 80 Wis. 230, 49 N. W. 745. But that replevin will not lie, in such cases, to recover possession of the property without returning or tendering back notes given for the purchase money, see *Oskamp v. Crites*, 37 Neb. 837, 56 N. W. 394. Under a contract for the sale of goods, providing that the purchaser shall give notes for the purchase price, the title to remain in the seller until a mortgage is given to secure such notes or the price is paid, the title to the goods remains in the seller, and if no rights of innocent third parties intervene, he may, upon the failure of the purchaser to give such mortgage, recover judgment on the notes and subsequently recover the goods by replevin: *Campbell etc. Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, 44 Am. St. Rep. 410, 29 Atl. 681. The interest of a vendee in a conditional sale of goods is attachable, and the attaching creditor can hold the goods, as against the vendor in a replevin suit, by seasonably tendering him the amount due on the purchase price: *Hervey v. Dimond*, 67 N. H. 342, 68 Am. St. Rep. 673, 39 Atl. 331. Contracts for the conditional sale of goods are sometimes called leases, but the same principle governs by whatever name the contract is called: *Wall v. De Mitklewicz*, 9 App. D. C. 109; *Ferguson v. Lauterstein*, 160 Pa. St. 427, 28 Atl. 852. When the purchaser or bailee fails to make the payments required by the contract, the seller or bailor may, in replevin, recover possession of the chattels: *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749. The purchaser, in an ordinary sale, where he has the title and right of possession, can sustain replevin against the vendor if the property is wrongfully detained: *Abraham v. Karger*, 100 Wis. 387, 76 N. W. 330.

To recover in replevin, the plaintiff must be the sole owner, or have the exclusive right of possession. An undivided interest is not sufficient: *Bray v. Raymond*, 166 Mass. 146, 44 N. E. 131. Hence, the general rule is that a joint owner of property cannot alone sustain replevin for its unlawful taking or detention: *Upham v. Allen*, 76 Mo. App. 206, 212; *Bain v. Trixler* (Ind., March, 1900), 56 N. E. 690; nor can one joint owner ordinarily sustain replevin for his undivided interest without joining his co-owner as a party plaintiff: *Fell v. Taylor*, 2 Penne. (Del.) 372, 45 Atl. 716; *Hart v. Fitzgerald*, 2 Mass. 509, 3 Am. Dec. 75; *Hill v. Robinson*, 16 Ark. 90; though it has been held that, if several own cereal grain, of the same kind and value, mingled together by their consent or by reason of circumstances reasonably to be foreseen, each may sustain replevin for his just proportion: *Piazzek v. White*, 23 Kan. 621, 33 Am. Rep. 211. It is proper, however, for joint owners to join in an action for the recovery of personal property: *Honaker v. Vesey*, 57 Neb. 413, 77 N. W. 1100. Replevin, or its statutory substitute, an action for the possession of specific personal property, cannot be sustained by one joint owner against his co-owner: *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. Rep. 229; *Lisenby v. Phelps*, 71 Mo. 522; *Cross v. Hulett*, 53 Mo. 397; *Bowen v. Roach*, 78 Ind. 361; *Mills v. Malott*, 43 Ind. 248. The owner of an undivided interest cannot sustain replevin against a co-owner: *Bowen v. Roach*, 78 Ind. 361. A tenant in common cannot ordinarily sustain replevin against his cotenant for the common property: *Kelley v. Vandiver*, 75 Mo. App. 435; though it has been held that, if one has the exclusive possession of corn in a single pile or crib, where both are equally entitled to possession, the other cotenant may, if a division properly demanded is refused, recover his portion of the grain by replevin: *Elmes v. Bolin*, 36 Neb. 621, 54 N. W. 990.

Parties Defendant.—As replevin runs against the party in possession, an officer, acting under an execution, may be sued either as an individual or as an officer: *Irwin v. Walling*, 4 Okla. 128, 44 Pac. 219. Replevin will lie against a plaintiff in execution, by whose direction it is levied upon the property of a third person: *Allen v. Crary*, 10 Wend. 349, 25 Am. Dec. 566. The owner of property may maintain replevin against a sheriff's vendee, although such action would not lie against the sheriff: *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301. A principal can sustain an action of claim and delivery against his agent: *Hormann v. Sherin*, 6 S. Dak. 82, 60 N. W. 145; and the owner of goods, carried by an express company, may sustain replevin for the goods against the agent of the company who has them in custody: *Eveleth v. Blossom*, 54 Me. 447, 92 Am. Dec. 555. A fraudulent vendee of goods and his assignee thereof for the benefit of creditors are liable to a joint action by the vendor to recover possession: *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259. In an action against a married woman for the recovery of personal property, claimed by the plaintiff un-

der a chattel mortgage given by her husband, the latter is not a necessary party where he is a nonresident and a fugitive from justice: *Heath v. Morgan*, 117 N. O. 504, 23 S. E. 489. If an infant disaffirms a contract and refuses payment on the demand of the adult for payment, or if suit is brought against him and he pleads infancy and avoids the debt, the adult may thereafter, in case the infant has possession of the property, maintain replevin therefor: *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; and where an infant makes a conditional purchase, the title to pass only when the price is paid, the seller may replevy the property sold, upon the infant's default, as title still remains in the plaintiff: *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34. Replevin in the detinet lies when and where the demand is made and the refusal occurs: *Nebeker v. Harvey*, 21 Utah, 363, 60 Pac. 1029. A purchaser of goods from a bailee is not liable in replevin to the owner for a tortious taking, but only for the detention, and the declaration should be in the detinet only: *Smith v. Clark*, 21 Wend. 83, 34 Am. Dec. 213. Replevin is sustainable against one who has wrongfully taken the plaintiff's property, and for a time detained it, but who has, before the commencement of the suit, sold and delivered it to another: *Sayward v. Warren*, 27 Me. 453.

Trial of Title.—The question of ownership or title is not necessarily involved in an action of replevin, which is to determine the right of possession only, but it may be involved. Generally speaking, in an action of replevin, the right to the possession of the property at the time suit is brought is the only matter in controversy, and the only question that can be tried and determined therein: *Hall v. Durham*, 113 Ind. 327, 15 N. E. 529; but in case the title is distinctly put in issue the better title will prevail: *Bartlett v. Goodwin*, 71 Me. 350. Title, even to realty, may, however, be inquired into and passed upon in replevin: *Elliott v. Powell*, 10 Watts, 453, 36 Am. Dec. 200; *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Pierce v. Hill*, 35 Mich. 194, 24 Am. Rep. 541; *Kelley v. Vandiver*, 75 Mo. App. 435; *Schulenberg v. Harriman*, 21 Wall. 44; *United States v. Steenerson*, 50 Fed. 504; *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; *Willard v. Kimball*, 10 Allen, 211, 87 Am. Dec. 632; and monographic note to *King v. Mason*, 89 Am. Dec. 431, discussing actions in which the title to real estate may not be tried or questioned. But it is not proper to make an action of replevin the means of litigating and determining the title to real property, as between conflicting claimants thereto: *Rees v. Higgins*, 9 Kan. App. 832, 61 Pac. 500; *Hines v. Good*, 128 Cal. 38, 79 Am. St. Rep. 22, 60 Pac. 527.

Wrongful Taking and Unlawful Detention.—Replevin in the cepit can be sustained only when trespass could be maintained: *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Barrett v. Warren*,

3 Hill, 348; *Acker v. Campbell*, 23 Wend. 374; and a wrongful taking from the actual or constructive possession of the plaintiff is necessary to support trespass or replevin in the cepit: *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463. There is a tortious taking, whenever there is an unlawful meddling with the property, or an exercise or claim of dominion over it, without any pretense of authority or right. This, without a manual seizing of the property, is held sufficient in New Jersey, and an action of trespass or replevin will lie there: *Haythorn v. Rushforth*, 4 Harr. 160, 38 Am. Dec. 540. Whoever takes the property of another, without his assent, express or implied, or without the assent of someone authorized to act in his behalf, takes it, in law, tortiously: *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258. The possession of the true owner cannot be divested by a tortious or fraudulent taking: *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 323; *Barrett v. Warren*, 3 Hill, 348. A tortious taking of goods does not change the property in them: *Barrett v. Warren*, 3 Hill, 348; as in the case of a sale induced by fraud: *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 323. So, if a sheriff levies an execution on property not belonging to the defendant in the writ, whether in his possession or not, the taking is tortious: *Wellman v. English*, 38 Cal. 583; and the possession of property acquired by a person purchasing from a bailee, who has no authority to sell, is tortious: *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258.

Property wrongfully taken is wrongfully detained until restored to its owner. Any act will constitute wrongful detention, in replevin, if it amounts to conversion in trover; and property is wrongfully detained, in replevin, though lawfully obtained, if kept after the plaintiff is lawfully entitled to have it returned to him: *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428. The selling of property to another without right is, in effect, a detention of it from the true owner: *Helman v. Withers*, 3 Ind. App. 522, 50 Am. St. Rep. 295, 30 N. E. 5. Every unlawful detention is a taking: *Sutherland v. Brace*, 71 Fed. 469, 73 Fed. 624; but a wrongful detainer after a lawful taking is not equivalent to a wrongful original taking: *Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463.

Demand and Refusal are necessary to sustain replevin where the defendant came lawfully into possession of the property, or where his possession is not wrongful: *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Moran v. Abbott*, 26 App. Div. 570; 50 N. Y. Supp. 337; *Porges v. Cohen*, 30 App. Div. 447; 52 N. Y. Supp. 71; *Fleischman v. Glaser*, 59 N. Y. Supp. 686; 28 Misc. Rep. 555; *Combs v. Bays*, 19 Ind. App. 263, 49 N. E. 358; *Campbell v. Quackenbush*, 33 Mich. 287; *Adams v. Wood*, 51 Mich. 411; *Keller v. Robinson*, 153 Ill. 458, 38 N. E. 1072. Thus, if goods have been sold, the title being reserved in the vendor as security for the payment of the purchase money, and payments have been made in installments and received, the vendor

cannot, after the final day for completing payment, where the vendee is in default, retake the goods without notice and demand: *People's etc. Carpet Co. v. Crosby*, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 658; *New Home Sewing Machine Co. v. Bothane*, 70 Mich. 443, 38 N. W. 326; *Grand Rapids Chair Co. v. Lyon*, 73 Mich. 438, 41 N. W. 497. Contra, *Forbes v. Martin*, 7 Houst. 375, 32 Atl. 327. In such a case, a tender on demand of the amount remaining due is sufficient, however, to retain the right of possession in the vendee: *People's etc. Carpet Co. v. Crosby*, 57 Neb. 282, 73 Am. St. Rep. 504, 77 N. W. 658. A demand is not excused by the defendant's denial of the plaintiff's title, after the commencement of an action of claim and delivery, where the property came lawfully into the defendant's possession: *Ludden v. Sumter*, 47 S. C. 335, 25 S. E. 150. A party rightfully in possession of property belonging to another does not unlawfully detain it, until after a demand by the true owner, and a refusal to deliver the possession: *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258. It is only where one obtains possession of property lawfully that demand is necessary to support replevin or trover: *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631. It is only when the original possession is lawful, and the action depends upon the unlawful detention that a demand is required: *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118. But demand and refusal, before bringing replevin, do not make the defendant's lawful possession unlawful: *Adams v. Wood*, 51 Mich. 411.

No demand is necessary to sustain replevin where the possession of the property was originally acquired by a tort: *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428; *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Richey v. Ford*, 84 Ill. App. 121; *Cottrell v. Carter*, 173 Mass. 155, 53 N. E. 375; *Denton v. Smith*, 61 Mich. 431, 28 N. W. 160; as where property is fraudulently purchased: *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Reeder v. Moore*, 95 Mich. 594, 55 N. W. 436; *Parrish v. Thurston*, 87 Ind. 437. These cases show that replevin for property, the sale of which was induced by fraud, can be sustained by the vendor, not only against the vendee, but against anyone who stands in his shoes, and without any prior demand for the property: *Burnham v. Ellmore*, 66 Mo. App. 617. Demand in such a case is not required to be made of a fraudulent vendee, nor of a sheriff who has taken possession of the property under an execution against such vendee: *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875. A demand is not necessary to sustain replevin for property bought of one who has no right to sell it: *Velsian v. Lewis*, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631, where the cases on the point are collected. A demand is not necessary to sustain replevin for property which has been wrongfully seized on

attachment or execution: *Merrill v. Denton*, 73 Mich. 628, 41 N. W. 823; *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27; *Burchett v. Purdy*, 2 Okla. 391, 37 Pac. 1053; *Nigh v. Dovel*, 84 Ill. App. 228, 232; as where the property of a stranger to the writ has been levied on, or, in other words, where the property of one not the judgment debtor is seized: *Williams v. Luckett*, 7 Mackey, 275; *Smith v. Jensen*, 13 Colo. 213, 22 Pac. 434; *Cassiday v. Ball*, 71 Ill. App. 181; *Whitney v. Levon*, 34 Neb. 443, 51 N. W. 972; *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902. Replevin is sustainable by a bona fide purchaser of property, without demand and refusal, against an officer who has taken it out of his possession on an execution against the seller: *Chandler v. Colcord*, 1 Okla. 260, 82 Pac. 330. No demand is necessary in replevin, when the defendant asserts ownership or title, or contests the case on an affirmative claim of right to possession: *Byrne v. Byrne*, 89 Wis. 659, 62 N. W. 413; *Greenawalt v. Wilson*, 52 Kan. 109, 34 Pac. 403; *Chapin v. Jenkins*, 50 Kan. 385, 31 Pac. 1084; *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23; *Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763; *Wilcox v. Beitel*, 43 Neb. 457, 61 N. W. 722; *Leek v. Chesley*, 98 Iowa, 593, 67 N. W. 580; *Kellogg v. Olson*, 34 Minn. 103, 24 N. W. 364; *Shoemaker v. Simpson*, 16 Kan. 43; *Webster v. Brunswick-Balke etc. Co.*, 37 Fla. 433, 20 South. 536; or where the defendant denies the plaintiff's rights: *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372, 60 N. W. 88; *Ogden v. Warren*, 36 Neb. 715, 55 N. W. 221; *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883; *George v. Hewlett*, 70 Miss. 1, 35 Am. St. Rep. 626, 12 South. 855; *Hyland v. Bohn Mfg. Co.*, 92 Wis. 157, 65 N. W. 170. Nor is a demand necessary, in claim and delivery, where the defendant denies the plaintiff's title or ownership: *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931; *Buffkins v. Eason*, 112 N. C. 162, 16 S. E. 916; *Woolen Co. v. McKinnon*, 114 N. C. 661, 19 S. E. 761.

A demand is not necessary in replevin where it would be futile or unavailing: *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883; *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23; as where the defendant admits that he has disposed of the property: *Torres v. Rogers*, 58 N. Y. Supp. 1104; 28 Misc. Rep. 176; or where he sets up title in himself: *Triplett v. Rugby Distilling Co.*, 66 Ark. 219, 49 S. W. 975; *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883. No demand is necessary where the only issue is the taking: *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848. If property sought to be replevied is in the possession of an agent, a demand upon him binds the principal: *Udell v. Slocum*, 56 Ill. App. 216; *Congdon v. Bailey*, 121 Mich. 570, 80 N. W. 369. The only effect of a failure to make a demand is to prevent a maintenance of the present suit: *Webster v. Brunswick-Balke etc. Co.*, 37 Fla. 433, 20 South. 536. An action of replevin is always in detinet, under the statute of Michigan, whether the taking is wrongful or not; and where the taking is wrongful,

and the plaintiff establishes his right to the property, the action cannot be defeated by a failure to make a prior demand: *Le Roy v. East Saginaw etc. Ry.*, 18 Mich. 233, 100 Am. Dec. 162. The note to *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27, shows when a demand is and is not necessary in that state before bringing replevin or trover. An action of claim and delivery brought by the pledgor within three years after claim of title to pledged property is made by the pledgee, and after tender and demand for its return, is not barred by limitation: *Latta v. Tutton*, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

What Property is Repleviable.—The owner of a chattel may, in general, replevy it from any person who has it in his possession and who has no right to retain it as against him: *Read v. Brayton*, 143 N. Y. 342, 38 N. E. 261. The possession of title deeds may be recovered under the code action for the recovery of personal chattels, and title deeds may be recovered in such action in a justice's court: *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486. Bailees for a special purpose have no right to sell the property bailed, and, upon such sale, the bailment is determined, and the real owner may replevy it from the vendee: *Emerson v. Fisk*, 6 Greenl. 200, 19 Am. Dec. 206. One whose property has been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action, even during the pendency of that action: *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502. A town can sustain replevin to recover the possession of furniture for the use of firemen, where it has been used by succeeding companies, until finally divided among the members of a company, which disbands, if the legal title to the property is in the town: *Inhabitants of Brookline v. Sherman*, 140 Mass. 1, 54 Am. Rep. 434, 1 N. E. 153; and if the members of a fire-engine company of a town take and detain property bought with its general funds, and used in furnishing its hall, and which property has passed, from year to year, to the succeeding company, the members of the new company may maintain replevin for the property: *Bisbee v. Fadden*, 140 Mass. 6, 1 N. E. 742. Replevin lies to recover a deed, though the fact of its delivery is in controversy: *Simmons v. Curtis*, 43 Minn. 539, 45 N. W. 1135; or the possession of certificates of deposit, where the plaintiff has been unlawfully deprived of their possession by the summary order of a judge: *Read v. Brayton*, 143 N. Y. 342, 38 N. E. 261; or where they have not been used for the purpose designated: *Robinson v. Stewart*, 97 Mich. 454, 56 N. W. 853; or to recover the possession of a check from a bailee: *Haas v. Altieri*, 21 N. Y. Supp. 950; 2 Misc. Rep. 252; or to recover a verified claim against an estate, upon the administrator's refusal to surrender it after he has had a reasonable opportunity to examine it: *Willis v. Marks*, 29 Or. 493, 45 Pac. 293; or to recover the possession of goods pledged by an owner's employé, without authority, to secure the latter's debt: *Worthington v. Vette*, 77 Mo. App. 445. If a vessel

only is seized, and there is no power to detain the cargo, the owner of the latter may replevy it: *Slocum v. Mayberry*, 2 Wheat. 1. Replevin lies to recover certain sheets and plates, alleged to be infringements of plaintiff's copyright of a photograph, and found in defendant's possession: *Morrison v. Pettibone*, 87 Fed. 330; or to recover the possession of goods converted in another state, if wrongfully detained within this state: *Belknap Sav. Bank v. Robinson*, 66 Conn. 542, 34 Atl. 495; or the possession of cattle unlawfully distrained: *Cox v. Chester*, 77 Mich. 494, 43 N. W. 1028; or the possession of a dog unlawfully detained: See the monographic note to *Hamby v. Samson*, 65 Am. St. Rep. 291, discussing property in dogs and the remedies for its enforcement. It is not essential, in replevin, that the property must be so situated as to make it possible to deliver it to the plaintiff: *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506.

One who has a right under a lease to kill goats, in moderation, on an island, can sustain claim and delivery for goat skins against trespassers who enter thereon and kill goats and carry away their skins, although he would not have had the right to kill all of the goats killed by the trespassers: *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684; and in the case of a conditional sale, where the plaintiff retains title until payment shall be made, and the vendee, after the levy of an attachment against him, makes default, the plaintiff, upon surrendering all obligations to the vendee, and making demand upon the sheriff for the possession of the property, can sustain claim and delivery therefor, if such possession is not surrendered: *Kellogg v. Burr*, 126 Cal. 38, 58 Pac. 306.

Money is not the subject of an action of replevin, unless it is marked or designated in some manner, so as to become specific as regards the power of identification, such as being in a bag or package, in which event it would be repleviable: *Hamilton v. Clark*, 25 Mo. App. 428, 433; *Pilkington v. Trigg*, 28 Mo. 95; *Sharon v. Nunan*, 63 Cal. 234; *Skidmore v. Taylor*, 29 Cal. 619; *Sager v. Blain*, 44 N. Y. 445. But while replevin will not lie for money having no identifying marks, it will lie to recover a belt containing a purse and money: *Eddings v. Boner* (Indian Ter., Jan. 1897), 38 S. W. 1110.

Replevin is sustainable to recover the possession of a promissory note which has been paid: *Savery v. Hays*, 20 Iowa, 25, 89 Am. Dec. 511. A promissory note is personal property and replevin will lie to recover rightful possession of it: *Graff v. Shannon*, 7 Iowa, 508; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80. An administrator may sustain replevin for a note belonging to an estate: *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80. One rightfully entitled to the possession of a promissory note can sustain replevin therefor: *More v. Finger*, 128 Cal. 313, 60 Pac. 933; especially where it has been forcibly or fraudulently obtained: *Bush v. Groomes*, 125 Ind. 14, 24 N. E. 81; *More v. Finger*, 128 Cal. 313, 60 Pac. 933. Its maker can sustain an action to recover its possession, when,

under the facts, equity would decree its cancellation: *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077. And replevin is a proper remedy for the recovery of drafts executed by the plaintiff, and which have become void by reason of their subsequent fraudulent alteration: *Smith v. Eals*, 81 Iowa, 235, 25 Am. St. Rep. 486, 46 N. W. 1110.

If a building is not actually attached to the soil, and is personalty as between the parties, replevin is sustainable to recover its possession: *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N. W. 554; *Salter v. Sample*, 71 Ill. 432; *McDaniel v. Lipp*, 41 Neb. 713, 60 N. W. 81; *Michigan etc. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Davis v. Taylor*, 41 Ill. 405. So, replevin is sustainable to recover the possession of a building which has been severed from the soil and moved away: *Michigan etc. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. 1035; *Luce v. Ames*, 84 Me. 133, 24 Atl. 720. But without a clear showing that a building is personalty, and that the claimant is entitled to the possession thereof, he cannot sustain replevin or claim and delivery therefor: *Ellsworth v. McDowell*, 44 Neb. 707, 62 N. W. 1082; *People's Sav. Bank v. Jones*, 114 Cal. 422, 46 Pac. 278; and see *Hall v. Cole* (Cal., Dec. 1894), 38 Pac. 894. He cannot maintain such an action where the building is a fixture: *Huebschmann v. McHenry*, 29 Wis. 655. The title to real estate cannot be directly litigated in an action of claim and delivery, and if a defendant, who is in the actual possession of land in good faith, claiming title thereto, sells a house thereon, which is severed from the land and removed by the vendee, one out of possession cannot, in an action of claim and delivery, secure possession of such house upon the claim that he is the true owner of the land: *Hines v. Good*, 128 Cal. 38, 79 Am. St. Rep. 22, 60 Pac. 427.

Replevin is sustainable to recover articles tortiously severed from realty, which but for such severance would be realty: *Congregational Soc. v. Fleming*, 11 Iowa, 533, 79 Am. Dec. 511; *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612, 20 Pa. St. 303; including buildings: *Luce v. Ames*, 84 Me. 133, 24 Atl. 720. Thus, a vendor may sustain replevin for a house erected upon premises by a vendee in possession under an unexecuted contract of sale, and sold by him to another, who removes it from the land, so long as it can be identified, and is not permanently annexed to other realty: *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332. But an owner of land cannot sustain replevin for chattels severed from the freehold if the land is held adversely, because he cannot assert his title in that manner. A landlord, however, may bring replevin for chattels wrongfully severed from the freehold by the tenant, for it seems that the title to the land is not thereby drawn in question: *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318. If a fence is torn down and the rails thrown on the ground, replevin is sustainable to recover the rails, because, by the severance, they lose their character as realty: *Moore v. Combs*, 24 Ind. App. 464, 56 N. E. 35. Replevin is

sustainable to recover the possession of timber wrongfully cut and removed from one's land: *Stahl v. Lynn*, 86 Wis. 75, 56 N. W. 188; *Hogan v. Hogan*, 102 Mich. 641, 61 N. W. 73; *Keweenaw Assn. v. O'Neil*, 120 Mich. 270, 79 N. W. 183; *Bartleson v. Mason*, 53 Ill. App. 644. Replevin lies for trees cut when the defendant had neither possession, title, nor claim to the land, but was a mere trespasser; but it does not lie for trees cut on land when the defendant was in possession under a claim of title: *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466. Neither will claim and delivery lie in such a case: *Harrison v. Hoff*, 102 N. C. 126, 9 S. E. 638. Replevin is sustainable by the United States to retake timber wrongfully cut from land belonging to the government: *United States v. Steenerson*, 50 Fed. 504; and where land belongs to the state, timber cut upon it belongs to the state, whose agent may seize it as the property of the state, and sustain the title of the state to the property against plaintiffs in replevin: *Schulenberg v. Harriman*, 21 Wall. 44. The controversy in this case was, in fact, between the plaintiff and the state. In Colorado, it has been held that, where the rights of a settler on public land have been unlawfully invaded by the felling and removing of trees therefrom, he must resort to the appropriate statutory remedy, which is not replevin: *Adkison v. Hardwick*, 12 Colo. 581, 21 Pac. 907.

Title to personal property cannot be acquired merely by changing its form. Hence, replevin lies for trees made into posts and rails by a wrongdoer: *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; and if standing timber is cut by an innocent trespasser and converted into cross-ties, the owner is entitled, in replevin, to a judgment for the delivery of the timber so converted, notwithstanding its value has been increased six times: *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123; *Stotts v. Brookfield*, 55 Ark. 307, 18 S. W. 179. If a portion of chattels cannot be replevied, because the defendants have destroyed, concealed, or sold such portion, the plaintiff may replevy that part of the property which can be found, and, it seems, maintain a separate action to recover the value of that which has been severed: *Bennett v. Hood*, 1 Allen, 47, 79 Am. Dec. 705. Where logs or lumber to which a defendant in replevin has no right of possession have been intermingled by him with other logs or lumber into a common mass, the plaintiff is entitled, under the legislation and decisions of some of the states, to replevy from the whole mass an amount equal to that to which the plaintiff is entitled: *Schulenberg v. Harriman*, 21 Wall. 44, 64; *Starke v. Paine*, 85 Wis. 633, 55 N. W. 185; *Bent v. Hoxie*, 90 Wis. 625, 64 N. W. 426.

Replevin is sustainable against an officer who has wrongfully taken possession of the plaintiff's personal property: See the monographic note to *Carpenter v. Innes*, 25 Am. St. Rep. 256-259, on replevin against officer. Hence replevin is sustainable against an officer, or other person having the possession, to recover property which has been illegally seized for taxes: *Lantis v. Reithmiller*, 95

Mich. 45, 54 N. W. 713; *Whittaker v. Fuller*, 96 Mich. 141, 55 N. W. 612; *Dudley v. Ross*, 27 Wis. 679. The owner may replevy against a purchaser at an illegal tax sale: *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33. A statute providing that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of the state, must be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceedings under some statutory authority: *Le Roy v. East Saginaw City Ry.*, 18 Mich. 233, 100 Am. Dec. 162. See, also, *Gray v. Flinn*, 96 Mich. 62, 55 N. W. 615. A statute prohibiting replevin against a tax collector does not prevent such an action by a stranger to the tax, and not in privity with the person assessed: *Tousey v. Post*, 91 Mich. 631, 52 N. W. 57; *Thompson Lumber Co. v. Hynes*, 84 Wis. 353, 54 N. W. 576.

As replevin lies against an officer, such an action is sustainable by an owner of personal property, or one claiming the right to its possession, against a sheriff who has taken it under a writ of attachment against a third person: *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902; *Wise v. Jefferis*, 51 Fed. 641; *Wheeler v. Eaton*, 67 N. H. 368, 39 Atl. 901; *Ayer v. Bartlett*, 170 Mass. 142, 49 N. E. 82; *Carpenter v. Innes*, 16 Colo. 165, 25 Am. St. Rep. 255, 26 Pac. 160; *Hannan v. Connett*, 10 Colo. App. 171, 50 Pac. 214; *Willis v. Reinhardt*, 52 Ark. 128, 12 S. W. 241; *Hakanson v. Brodke*, 36 Neb. 42, 53 N. W. 1033; *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623; *Jones v. McQueen*, 13 Utah, 179, 45 Pac. 202. Replevin will lie either against the sheriff or other officer or person having possession of the property so taken: *Willis v. Reinhardt*, 52 Ark. 128, 12 S. W. 241; and without a previous demand, if the property was so taken from the plaintiff's possession: *Note to Carpenter v. Innes*, 25 Am. St. Rep. 258. The property of one attached as that of another may be replevied even from a warehouseman: *Robinson v. Besarick*, 156 Mass. 141, 30 N. E. 353. A statute prohibiting replevin for property taken on attachment or execution, the object of which is to prevent the possession of the officer from being disturbed by the institution of independent actions, precludes the owner from pursuing such remedy only so long as the property is in the custody of the officer. He may, if he elects to do so, postpone action until after a sale is made, and then resort to his action of replevin against the purchaser: *Lowenstein v. Spalding*, 65 Miss. 204, 3 South. 204. An officer who seizes the wrong property, under valid process, or under void process, is liable to an action of claim and delivery: *Southern Ry. Co. v. Sarratt*, 58 S. C. 98, 36 S. E. 504. Such an action, or one to recover the possession of personal property, lies where the property of one has been attached as that of another: *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897; *Mitchell v. Sims*, 124 N. C. 411, 32 S. E. 735; *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623; *First Nat. Bank v. North*, 2 S. Dak. 480, 51 N. W. 96.

Replevin lies against a sheriff, in a proper case, where he has taken such possession of property, by attachment, as is contemplated by law, as, where he has taken possession and left a man in charge of the property, forbids persons from claiming the right of possession, and refuses to deliver it up on demand: *Aman v. Mottweiler*, 15 Ind. App. 405, 44 N. E. 63; and see *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191. Although a statute has provided a remedy, where property seized on attachment or execution is claimed by some person other than the attachment or execution defendant, the plaintiff is not restricted to it where he brings replevin before notice of a writ of attachment, and may continue his remedy by replevin, if commenced before he received such notice: *Patterson v. Snow*, 24 Ind. App. 572, 57 N. E. 286. But one holding a bill of sale of goods to secure a debt cannot sustain replevin against a sheriff in possession of the goods under a levy of attachment against the person who gave the bill of sale: *Seibenbaum v. Delanty*, 4 Wash. 596, 30 Pac. 662.

Replevin is sustainable to recover the possession of personal property taken by attachment, execution, or other legal process from the owner, when such property is exempt from seizure by such process: *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138; *Mills v. Pryor*, 65 Ark. 214, 45 S. W. 350; *Gimble v. Ackley*, 12 Iowa, 27; *Allen v. Ingram*, 39 Fla. 239, 22 South. 651; note to *Carpenter v. Innes*, 25 Am. St. Rep. 257. Contra, *Prescott v. Starkey*, 71 Vt. 118, 41 Atl. 1021. Claim and delivery are also sustainable for it: *Wagner v. Olsen*, 3 N. Dak. 69, 54 N. W. 286; *Linander v. Longstaff*, 7 S. Dak. 157, 63 N. W. 775. That property attached is exempt from execution may be shown on motion to dissolve the attachment or to have the property released; but if the party fails to avail himself of such motion, it does not follow that his right to the property under the law is forfeited, or that he is estopped from recovering it in replevin. A judgment and order to sell property attached is no bar to an action of replevin for the property, on the ground that it is exempt from seizure and sale: *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138.

Property taken on execution is repleviable, where the taking was wrongful: *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593; notes to *Dunham v. Wyckoff*, 20 Am. Dec. 698; *Carpenter v. Innes*, 25 Am. St. Rep. 256-259; *Muller v. Plue*, 45 Neb. 701, 64 N. W. 232; *Wilson v. McQueen*, 1 Head, 18; *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302; *Coughran v. Sundback*, 9 S. Dak. 483, 70 N. W. 644. Thus, replevin or claim and delivery for personal property is sustainable by the owner against an officer taking the same under an execution against a third person: Note to *Carpenter v. Innes*, 25 Am. St. Rep. 257; *Dunham v. Wyckoff*, 3 Wend. 280, 20 Am. Dec. 695; *Agnew v. Wilson*, 46 Ill. App. 205; *Gallagher v. Bishop*, 15 Wis. 303, *276; *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302; *Hoskins v. Robinson*, 101 Ky. 667, 42 S. W. 113. Replevin is sustainable

against a sheriff for property seized by him under an execution, by any claimant thereof other than the execution debtor: *Flanagan v. Wheten*, 31 N. B. 295; *Hocken v. Doucett*, 31 N. B. 369; and by him when the property is exempt: *Wilson v. McQueen*, 1 Head, 16; *Whitney v. Swensen*, 43 Minn. 337, 45 N. W. 337; note to *Carpenter v. Innes*, 25 Am. St. Rep. 257. Replevin lies to recover the possession of property taken by virtue of an execution on a void judgment: *Muller v. Plue*, 45 Neb. 701, 64 N. W. 232. So, one whose goods, in the hands of his agent, are seized by a sheriff under an execution against the agent, can sustain replevin for them against such sheriff: *Clark v. Skinner*, 20 Johns. 465, 11 Am. Dec. 302. A mortgagee or pledgee who takes possession of the chattels mortgaged or pledged before any other lien attaches thereto, or who is entitled to their possession, can sustain replevin therefor as against attachment or execution creditors: *Prouty v. Barlow*, 74 Minn. 130, 76 N. W. 946; *Coughran v. Sundback*, 9 S. Dak. 483, 70 N. W. 644; *Smith v. Koenig*, 57 N. J. L. 486, 31 Atl. 979. To assert, however, that the lien of a mortgage still exists after payment of the mortgage debt is a fraud on the mortgagor's execution creditors, and they may levy upon the property without making the levying officer liable in replevin for the return of the property to the mortgagee: *Mueller v. Provo*, 80 Mich. 475, 20 Am. St. Rep. 525, 45 N. W. 498. In Michigan, an owner of personal property can sustain replevin, without prior demand, against an officer who has taken it under attachment or execution against a third person in whose possession it was found: *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902. It has been held in a number of the state courts that replevin can be sustained in a state court against a United States marshal to recover goods seized by him on attachment, or execution, or on mesne or final process issued from a United States court, when the goods belong to some other person than the defendant named in the writ: See the monographic note to *Carpenter v. Innes*, 25 Am. St. Rep. 259, on replevin against officer. But *Freeman v. Howe*, 24 How. 450, to the contrary, was followed in *Krippendorf v. Hyde*, 110 U. S. 276, 5 Sup. Ct. Rep. 27, holding that the claimant, in such a case has no adequate remedy against the marshal in the state court: See, also, *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355, affirming *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27. That a remedy affecting the custody of the property, such as replevin, is exclusively within the jurisdiction of the federal court, see *Munson v. Harroun*, 34 Ill. 422, 85 Am. Dec. 316. That cross-replevin cannot be maintained, see *Hagan v. Deuell*, 24 Ark. 216, 88 Am. Dec. 769; *Simon v. Leland*, 105 Mich. 226, 63 N. W. 76. In *Relley v. Haynes*, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440, it is held that replevin may be maintained against a sheriff who holds property by virtue of a writ in another action of replevin then pending and undetermined, and also against the plaintiff in such suit, where the plaintiff in the latter suit is not a party

to the first; but in *Welter v. Jacobsen*, 7 N. Dak. 32, 66 Am. St. Rep. 632, 73 N. W. 65, it is held that, if a sheriff is already in possession of property taken by him in proceedings in an action of replevin, a second replevin suit cannot be maintained against him for the same property by a stranger to the first action. Replevin is, however, sustainable against a sheriff after it has become his duty to deliver the property taken by him under a writ of replevin to one of the parties in that suit, and he fails, after a reasonable time, to make such delivery: *Welter v. Jacobsen*, 7 N. Dak. 32, 66 Am. St. Rep. 632, 73 N. W. 65.

It hardly needs any citation of authority to show that property in the custody of the law is not repleviable: *Lemp v. Fullerton*, 83 Iowa, 192, 48 N. W. 1034; *Welter v. Jacobsen*, 7 N. Dak. 32, 66 Am. St. Rep. 632, 73 N. W. 65; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. Rep. 355; *Lewis v. Buck*, 7 Minn. 104, 82 Am. Dec. 73. Thus, that property is in the possession of a United States marshal by virtue of process of a United States court is an impregnable defense to an action of replevin of the same property in a state court: *Booth v. Ableman*, 16 Wis. 460, 84 Am. Dec. 711. And property in the hands of an officer in a replevin suit is in the custody of the law, and any attempt to wrest such possession from the officer by means of another action of replevin is a contempt of court: *Welter v. Jacobsen*, 7 N. Dak. 32, 66 Am. St. Rep. 632, 73 N. W. 65. But property wrongfully seized by an officer, on attachment, execution, or other process, is not in the custody of the law and is therefore repleviable: *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; as where the property of one has been taken on a writ against another: *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593. The maxim that replevin does not lie for goods in the custody of the law applies only to cases where the seizure of the law was rightful, and upon a valid and sufficient process: *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897; *Read v. Brayton*, 143 N. Y. 342, 38 N. E. 261; *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; and see *Dunham v. Wyckoff*, 3 Wend. 280, 20 Am. Dec. 695. The rule of the common law, that property levied on under execution is in custodia legis, and cannot therefore be replevied from the possession of the levying officer, has been much modified in many states by statutes and codes of procedure, which permit this remedy to a stranger to the writ whose property has been levied on, and in many states to the execution defendant also, whose exempt property has been taken, "and even in the absence of statutes of this kind, logic and law would permit this remedy to the debtor": See extended note to *Van Dresor v. King*, 75 Am. Dec. 646. The lawful possession of an assignee for the benefit of creditors is not the custody of the law, and replevin is sustainable for the possession of property in his hands: *Matthews v. Ott*, 87 Wis. 399, 58 N. W. 774. If the possession of a stolen horse, taken from a defendant charged with larceny, is relinquished

by a constable, upon the court's ordering the horse to be delivered to the defendant upon the execution of a certain bond, with a penalty, the horse is not in the custody of the law and may be replevied: *Byrne v. Byrne*, 89 Wis. 659, 62 N. W. 413. So, if the defendants have replevied property from a third person, and it has been delivered into their possession upon their giving a bond, the plaintiff may replevy it out of their hands before the settlement of their suit with the third party, if the plaintiff was not a party to that suit, as the property is not in the custody of the law: *Hagan v. Deuell*, 24 Ark. 216, 88 Am. Dec. 769.

If chattels are fraudulently purchased and detained, the vendor may rescind the sale and recover possession of them by replevin: *McKinney v. First Nat. Bank*, 36 Neb. 629, 54 N. W. 963; *Hammond v. Lynes*, 21 Fla. 118; *Cary v. Samuel*, 1 Hill, 311, 37 Am. Dec. 323; *Neff v. Landis*, 110 Pa. St. 204, 1 Atl. 177; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Sleeper v. Davis*, 64 N. H. 59, 10 Am. St. Rep. 377, 6 Atl. 201; *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; *Gulledge v. Slayden etc. Mills*, 75 Miss. 297, 22 South. 952; *Field v. Morse*, 54 Neb. 789, 75 N. W. 58; *Farrand etc. Organ Co. v. Methodist Church*, 17 Utah, 469, 54 Pac. 818; 18 Utah, 29, 54 Pac. 818; without demand: *Hall v. Gilmore*, 40 Me. 578; *Burnham v. Ellmore*, 66 Mo. App. 617; *Thayer v. Turner*, 8 Met. 550; *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *Parrish v. Thurston*, 87 Ind. 437. And this right passes to the vendor's assignee: *Reeder etc. Shoe Co. v. Prylinski*, 102 Mich. 468, 60 N. W. 969. When a vendor of goods and chattels is induced, by fraudulent means, to part with his property under color of a contract of purchase, no title passes to the fraudulent vendee, according to some of the authorities, even though delivery is made; and execution creditors, or purchasers, or mortgagees from the fraudulent vendee do not acquire a title superior to that of the original vendor, unless they are purchasers or mortgagees in good faith and for a valuable consideration: *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 311. Hence, the rule is, that the seller of goods bought fraudulently may rescind the sale and replevy them wherever found, except in the hands of an innocent purchaser for value, without notice: *Hacker v. Munroe*, 176 Ill. 384, 52 N. E. 12; *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 311; *Staver etc. Mfg. Co. v. Coe*, 49 Ill. App. 426; *Weed v. Page*, 7 Wis. 503; *Swafford etc. Co. v. Jacobs*, 66 Mo. App. 362; and, where the statute requires the contract to be recorded, the seller may replevy the property in the hands of an innocent transferee unless the contract is recorded: *Lee etc. Furniture Co. v. Cram*, 63 Conn. 433, 28 Atl. 540. The seller of goods bought fraudulently may, it has been held, replevy them from the fraudulent vendee's bona fide pledgee: *Rodliff v. Dallinger*, 141 Mass. 1, 55 Am. Rep. 439, 4 N. E. 805. He may sustain replevin for them against the fraudulent vendee's assignee for the benefit of creditors: *Farley v. Lincoln*, 51 N. H. 577, 12 Am. Rep. 182; *Burnham v. Ellmore*, 66 Mo. App. 617; or against the ven-

dee's mortgagee: *Mahoney v. Gano*, 2 Ind. App. 107, 27 N. E. 315; or against a purchaser from the vendee who was a conspirator in the fraud, or who had notice of it: *Manning v. Albee*, 14 Allen, 7, 92 Am. Dec. 736.

If goods are fraudulently sold by a carrier, without delivery, it seems that trespass or replevin in the cepit will lie by the owner against the purchaser, although he bought the property in good faith: *Ely v. Ehle*, 3 N. Y. 506. Trespass, replevin, or trover may be sustained by a vendor whose goods have been obtained from him by a fraudulent purchase: *Cary v. Hotailing*, 1 Hill, 311, 37 Am. Dec. 323. Compare the extended note to *Thurston v. Blanchard*, 33 Am. Dec. 702-711, showing when a vendor may reclaim goods fraudulently purchased. If the vendor, in such cases, has received nothing of value, the bringing of an action to reclaim the property is ordinarily a sufficient disaffirmance of the contract: *Mahoney v. Gano*, 2 Ind. App. 107, 27 N. E. 315; but where he has received something of value, such as earnest or other money from the purchaser, the authorities are divided upon the question as to whether he must return, or offer to return, it, as a condition precedent to the commencement of a replevin suit. That he must do so, see *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16; *Moriarity v. Stoffernan*, 89 Ill. 528; *Weed v. Page*, 7 Wis. 503; *Gittings v. Carter*, 49 Iowa, 338; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Parrish v. Thurston*, 87 Ind. 437; *Guckenheimer v. Angevine*, 81 N. Y. 396; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875. This view seems to be supported by the weight of authority, but there are numerous cases to the contrary: *Bush v. Bender*, 113 Pa. St. 94, 4 Atl. 213; *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. 67; *Schofield v. Shiffer*, 156 Pa. St. 65, 27 Atl. 69; *Sisson v. Hill*, 18 R. I. 212, 26 Atl. 196; *Warner v. Vallily*, 13 R. I. 483; *Farrand etc. Organ Co. v. Methodist Church*, 17 Utah, 469, 54 Pac. 818; 18 Utah, 29, 54 Pac. 818; *John V. Farwell Co. v. Hilton*, 84 Fed. 293. See, also, *Henry L. Crane Boot etc. Co. v. Trentman*, 34 Fed. 620; *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373.

The rule, however, that requires a return or offer to return what the vendor has received under the contract is wholly an equitable one, and impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required: *Sloane v. Shiffer*, 156 Pa. St. 59, 27 Atl. 69. The tender of a worthless note would be unnecessary: *Pangborn v. Ruemenapp*, 74 Mich. 572, 42 N. W. 78; especially if the purchaser cannot be found: *Manning v. Albee*, 11 Allen, 520; and the production of any note upon the trial is probably sufficient: *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259. Where a sale of property has been induced by fraud, the defrauded party may, upon discovery of the fraud, rescind the contract and maintain replevin for the property, without returning property received by him, when such return is impossible, or where the party guilty of the fraud has, by his own act, put it out of the

power of the plaintiff to make such return: *Faulkner v. Klamp*, 16 Neb. 174, 20 N. W. 220. A seller of goods bought fraudulently may also replevy them from the vendee's attaching creditors: *Buffington v. Gerrish*, 15 Mass. 156, 8 Am. Dec. 97; *Depew v. Beakes*, 16 App. Div. 631, 44 N. Y. Supp. 774; especially where the attachment is fraudulent: *Craig v. California Vineyard Co.*, 30 Or. 43, 46 Pac. 421; but in New York, it is held that a sale of goods induced by fraud is not void, but voidable only; that the title and possession pass to the purchaser by the sale and delivery, notwithstanding the fraud, subject, however, to the right of the vendor to rescind the contract, if he so elects; and that if they are seized on attachment or execution against the purchaser prior to rescission, an action of replevin to recover them is not maintainable: See the principal case; *Wise v. Grant*, 140 N. Y. 593, 35 N. E. 1078; *Pinckney v. Darling*, 3 App. Div. 553, 38 N. Y. Supp. 411; affirmed in same case, 158 N. Y. 728, 53 N. E. 1130; and see *Weed v. Page*, 7 Wis. 503. In *Scott v. McGraw*, 3 Wash. 875, 29 Pac. 260, it is held that the rescission of the sale on the ground of fraud may be made by the vendor subsequent to the property's coming into the custody of the sheriff.

Pleading, Proof, and Practice.—In replevin, and in the action under the code, to recover the possession of chattels wrongfully detained, the plaintiff must, in order to recover, have a general or special property in the chattels together with the right of possession, and the declaration must show this fact. A mere allegation that he is "entitled to the possession" is not enough: *Pattison v. Adams*, 7 Hill, 126, 42 Am. Dec. 59, and note. A complaint, in an action under the code, to recover the possession of personal property is sufficient, without any allegation of demand and refusal, where it merely alleges that the same is the property of the plaintiff, and that the defendant has become possessed of and wrongfully detains it; and under an allegation that the defendant "wrongfully detains," the plaintiff may prove, in such an action, either a wrongful taking, a demand and refusal, or facts which render a demand unnecessary where the original taking was lawful. Proof of any facts showing that the property was wrongfully detained at the time of the commencement of the action will satisfy the allegation of the complaint, and entitle the plaintiff to recover: *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428. The defendant, in an action of replevin, can prevail only when it appears that he is entitled to a return of the property, and that can only be when it appears that his right is superior to that of the plaintiff. The plaintiff is entitled to recover the property as against anyone who cannot show a better right to it: *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623. Replevin for property wrongfully detained is not sustainable, without proof of the wrongful detention, where the defendant came lawfully into possession of the property; and a previous demand must be proved before suit, where there has been no wrongful conversion by the defendant: *Adams v. Wood*, 51 Mich. 413, 15 N. W. 788. If the plaintiff has a

cause of action for the wrongful taking of property, and also for its wrongful detention, he may waive the former and sue for the latter, the same as before the code: *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428. Proof of a wrongful taking, or of a subsequent wrongful conversion in case the defendant's possession was rightful in its inception, will support a complaint in replevin for a wrongful detention without proof of a demand before suit: *Guthrie v. Olson*, 44 Minn. 404. While a defendant, in replevin, is not entitled to a return of the property unless he demands it, his answer may be amended at any stage of the case, and when the plaintiff has obtained possession, such a demand in the answer will form a basis upon which a proper judgment may be entered: *Aultman etc. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756. It is no defense to an action of replevin against one who has obtained the possession of the plaintiff's property without right that the defendant has transferred the possession, either before or after the commencement of the suit: *Helman v. Withers*, 3 Ind. App. 532, 50 Am. St. Rep. 295, 30 N. E. 5. In replevin for a wrongful taking and unlawful detention, the venue is in the county where such taking and detention occurred: *Woodward v. Edmunds*, 20 Utah, 118, 57 Pac. 848.

FOX v. MOHAWK AND HUDSON RIVER HUMANE SOCIETY.

[165 N. Y. 517, 59 N. E. 353.]

CONSTITUTIONAL LAW—LICENSE FEE FOR DOGS.—A STATUTE which provides that every person who owns or harbors dogs within the limits of any city having a specified population in which there exists, or may hereafter exist, an incorporated society for the prevention of cruelty to animals, shall procure a yearly license for each animal and pay the sum of one dollar therefor to such society; that dogs not licensed according to the provisions of the act shall be seized and, if not redeemed within forty-eight hours, destroyed or otherwise disposed of at the discretion of the society; and that the license fees are to be used by the society toward defraying the cost of carrying out the provisions of the statute and maintaining a shelter for lost, strayed, or homeless animals, "and for its own purposes," is unconstitutional so far as it requires the owner of a dog to pay a license fee to the society for its own use.

CONSTITUTIONAL LAW—LICENSE FEE FOR DOGS—PUBLIC MONEYS—GIFTS OF.—License fees required by statute of one who owns or harbors dogs are public moneys, and their appropriation by the statute to a society organized by the voluntary action of individuals alone, violates that section of the constitution which prohibits gifts of money to, or in aid of, any association, corporation, or private undertaking.

CONSTITUTIONAL LAW—OWNING OR HARBORING DOGS—EXCLUSIVE PRIVILEGE.—As the statute providing for

the incorporation of societies for the prevention of cruelty to animals permits the incorporation of but one society in a county, another statute, so far as it empowers such a society to appropriate, harbor, and keep dogs without paying any license fee therefor, while every other citizen is obliged to pay such license fee, is unconstitutional, for the reason that it grants an exclusive privilege and immunity forbidden by the constitution.

G. B. Wellington, for the appellant.

J. S. Frost and L. C. Warner, for the respondent.

David B. Hill and John L. Cadwalader, for several societies interested in the questions involved.

520 CULLEN, J. This action was brought to restrain the defendant from killing, disposing of, or interfering with the plaintiff's dogs, he having refused to pay the license fee prescribed by chapter 448 of the Laws of 1896, entitled "An act for the prevention of cruelty to animals and empowering certain societies for the prevention of cruelty to animals to do certain things." The defendant was formed by the consolidation of a society for the prevention of cruelty to children with one for the prevention of cruelty to animals, and was vested with all the powers of each association: Laws 1894, c. 292. The defendant in its answer pleaded its corporate organization and its power and authority under the statute of 1896, and upon the trial admitted its intent to seize the plaintiff's dogs for nonpayment of license fees. The sole question involved in the case is the constitutionality of the provisions of this statute. No objection has been made to the mode of procedure adopted, nor to the plaintiff's right to maintain the action and we shall raise none. The court at special term held the statute valid and rendered judgment for the defendant. The appellate division reversed the judgment below and granted a new trial, and from the order of reversal the defendant has appealed to this court. The statute of 1896 provides that every person who owns or harbors dogs within the limits of any city having a specified population, in which there exists, or may thereafter exist, an incorporated society for the prevention of cruelty to animals, shall procure a yearly license for each animal and pay the sum of one dollar therefor to such society. Dogs not licensed according to the provisions of the act shall be seized, and, if not redeemed within forty-eight hours, destroyed or otherwise disposed of at the discretion of the society. The license fees are to be used by the society toward defraying the cost of carrying out the provisions of the statute and maintaining a shelter for

lost, strayed, or homeless animals, "and for its own purposes." The learned appellate division held this legislation void on two grounds: 1. That the direction for the summary destruction or appropriation of the dog without notice ⁵²¹ to the owner was taking the property of such owner without due process of law; 2. That the act assumed to vest in the defendant, a private corporation, the execution of certain police powers of the state, and, in effect, to constitute it a public officer. We are of opinion that the decision below cannot be upheld on either of these grounds. Under any circumstances, there is but a qualified property in dogs, cats, and similar animals, and, in fact, there may be said to be no property in them as against the police power of the state. In *Sentell v. New Orleans etc. R. R. Co.*, 166 U. S. 698, 17 Sup. Ct. Rep. 693, the supreme court of the United States upheld the constitutionality of a statute of the state of Louisiana, which provided that no dog should be entitled to the protection of the law unless it should have been placed on the assessment-rolls, and that the owner should not recover for injuries done to the dog in any civil action beyond the value fixed by him on the assessment-roll, which statute was challenged as depriving the owner of property without due process of law in contravention of the fourteenth amendment of the federal constitution. In the opinion there delivered will be found a review of the common law on the subject of dogs and of the legislation of the various states and the decisions of the state courts on the same subject. Such legislation and decisions are in substantial harmony. In *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94, a statute authorizing the summary destruction of dogs not licensed and collared according to the provisions of the statute was held valid and constitutional. It was there said: "Dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals." In *Morewood v. Wakefield*, 133 Mass. 240, a statute which authorized any person to kill a dog which had no collar on, even though licensed, was upheld. The decisions in *Morey v. Brown*, 42 N. H. 373, *Tenney v. Lenz*, 16 Wis. 566, *Mitchell v. Williams*, 27 Ind. 62, *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152, *Jenkins v. Ballantyne*, 8 Utah, 245, 30 Pac. 760, are to the same effect. Nor is the rule in this state different. In *Mullaly v. People*, 86 N. Y. 365, it was held that ⁵²² dogs are the subject of larceny, the decision proceeding on the ground that the Revised Statutes had changed the common-law rule to the contrary, and recognized dogs as property by

providing for their taxation. But the proposition that there is property in a dog as against a wrongdoer is very different from the proposition that an owner has the same right of property in a dog as against the police power of the state which he has in useful domestic animals. The same title of the Revised Statutes that directed the taxation of dogs (title 17, chapter 20, part 1) authorized any person to kill a dog so taxed unless the tax was paid within five days after demand (section 6) or any dog which he might see chasing, worrying, or wounding any sheep: Sec. 15. This last provision was but a re-enactment of previous legislation: 1 Rev. Laws, secs. 1, 7, p. 169. Summary confiscation of this character, without judicial process, would, in the case of domestic animals such as horses, oxen, and the like, even though those animals were trespassing, be unconstitutional: *Rockwell v. Nearing*, 35 N. Y. 302; but the legislation regarding dogs, though it has stood on the statute books for nearly a century, has never been questioned. Nor if the statute is not condemned for other reasons do we think it presents a case of the delegation of governmental power to a private corporation. As unlicensed dogs have been so long subject to destruction by every person, the authority given to the officers or agents of the defendant to kill such dogs is neither greater nor less than that conferred on other citizens.

We think, however, that the statute is unconstitutional so far as it requires the owner of a dog to pay a license fee to the defendant for its own use. In *People v. Murray*, 149 N. Y. 374, 44 N. E. 146, the question was as to the validity of the liquor tax law, which was assailed as directing an appropriation of public money for local purposes, and as not having been passed by a two-thirds vote of the legislature, as required by section 20, article 3, of the constitution of the state. The statute was upheld on the ground that the term "public money" was used in this section of the constitution ⁵²³ in the narrow, restricted sense of meaning money of the state at large, in contradistinction from moneys raised for local governmental purposes. Judge Andrews, in delivering the opinion in that case, wrote of license fees: "In a strict and accurate sense they were public moneys. No exaction can be lawfully made of a citizen by way of tax, impost, or excise, except under authority of the legislature, and the product of such imposition is public money." The correctness of this doctrine is too clear to be questioned. The appropriation of public money for other than strictly governmental purposes, and its expenditure through other than official chan-

nels, have been most carefully limited by article 8 of the constitution. By section 9 it is prescribed: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper." By section 10: "No county, city, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation. . . . This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law." Section 14 provides: "Nothing in this constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages" for these purposes "may be authorized, but shall not be required by the legislature." By this comprehensive enumeration of money of the state, of a county, city, town, and village, it is plain that the constitution meant to include ⁵²⁴ all public moneys which are raised in any manner throughout the state as an exaction from the citizen by the taxing or licensing power of government. Pecuniary penalties for offenses are not imposed under either the taxing or licensing power of the state, and probably would not fall within these constitutional restrictions as to public money. So little vested right of property is there in a penalty that in a civil case it may be taken away by the repeal of the statute at any time before judgment (*Cooley's Constitutional Limitations*, 383; *People v. Livingston*, 6 Wend. 526), and in criminal cases also by pardon. Authority to apply public moneys for educational purposes is given in other sections of the constitution. If the appropriation to the defendant of license fees prescribed by this statute is a gift of money to or in aid of an association, corporation, or private undertaking, then it is in conflict with the constitutional provision cited. It is not necessary to determine whether these license fees are to be regarded as the money of the city or the money of the state. If money of the city, only permissive legislation empowering its

appropriation is authorized by the constitution; if it is the money of the state, it does not come within the exception to the constitutional inhibition, to wit: "Provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents." It is contended, however, that the defendant, though a corporation organized by the voluntary acts of individuals, is a "subordinate governmental agency," and that an appropriation of money to its use is but an appropriation of money for the support of the government and not within the constitutional restrictions. If it were necessary for the disposition of this case, agreeing with the view of the learned appellate division, I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty, and property of the citizens, except that of eminent domain, to be exercised for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may ⁵²⁵ be other exceptions, but they do not occur to me. Of course, the state or any of its subdivisions may employ individuals or corporations to do work or render service for it; but the distinction between a public officer and a public employé or contractor is plain and well recognized: *People v. Cram*, 164 N. Y. 167, 58 N. E. 112; *Mechem on Public Officers*, sec. 2. I do not base my judgment exclusively on the view that a corporation cannot take an oath of office, for the acts of the corporation must be done by agents who are natural persons. In many cases the legislature has created corporations from boards of public officers. My chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens), that the agents or officers of the corporation are appointed such by the incorporators, and that if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public officers on a few of the citizens, and possibly persons not citizens, while under the constitution all public officers must be elected or appointed by other public authorities, and thus trace their title to power and authority either immediately or mediately back to the people: See *Ames v. Port Huron etc. Co.*, 11 Mich. 139, 83 Am. Dec. 731; *State v. Kennon*, 7 Ohio St. 547; *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488. But if we assume that the legislature can create and has created this defendant "a subordinate govern-

mental agency," to assist in the enforcement of the criminal laws relative to cruelty to animals, still that assumption will not establish the proposition that the devotion of these license fees is to a governmental purpose. It cannot be said to be compensation for services done in the destruction of the dogs, for the amount of money received is in inverse proportion to the services rendered. If licenses were taken out for all the dogs, there would be no dogs to be killed, and the defendant would receive the money without service. While, if none of the dogs were licensed, all would be subject to destruction, and the defendant would obtain ⁵²⁶ nothing for its services. But the defendant is not required to kill unlicensed dogs. It may dispose of them as it sees fit, and, therefore, retain them. It is empowered by the statute to apply the license moneys to maintaining a shelter for lost, strayed, or homeless animals, which would include the very dogs seized for nonpayment of the license. I cannot see why under this statute the defendant may not maintain a kennel of the largest description in which to retain dogs for its pleasure, or from which to sell dogs for its profit. It seems to me idle to argue that such a work is governmental, or that a corporation engaged in discharging it is pro tanto "a subordinate governmental agency." It is contended that the statute was enacted to exterminate homeless, wandering, or diseased dogs, which may be a source of great danger to life and health. If the statute prescribed action appropriate to effect such result, the work directed to be done in pursuance of it might be well termed governmental, and a very different question presented. The legislation before us we think destitute of any such feature. It is but an exaction of money or property from one citizen and its appropriation to another for its private use. Such is not a valid exercise of taxing power: *Cooley on Taxation*, 572; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Loan Assn. v. Topeka*, 20 Wall. 655. We are of opinion, therefore, that the statute, so far as it compels the owners of dogs to pay license fees to the defendant for the purposes prescribed in the statute, is an unauthorized appropriation of public moneys, and is in conflict with the constitution.

We are of further opinion that the statute, so far as it empowers the defendant to appropriate, harbor, and keep dogs without paying any license fee, while every other citizen is obliged to pay such license fee, is the grant of an exclusive privilege and immunity forbidden by section 18, article 3, of the constitution. The law for the incorporation of societies of the character of

this defendant permits the incorporation of but one society in a county. Therefore, the defendant is the only person, natural or artificial, who can keep dogs ⁵²⁷ without paying a license. Doubtless the legislature might discriminate between different breeds of dogs, and provide that certain breeds should not be harbored within the state, while others it could suffer to be kept. It might subject the keeping of dogs to restrictions which, by reason of their conditions, might in practice discriminate as to the right to keep dogs. If this classification was fairly adapted to the destruction of vicious dogs or dogs of a vicious breed, or to keeping dogs under such conditions as to prevent their endangering the persons or health of the members of the community, it would be a valid exercise of the police power and justifiable. But under the law before us no distinction is made between the breeds or individual characters of dogs, nor as to the manner in which dogs may be restrained and kept. The defendant can keep any dog it sees fit, and is not required to pay anything for the privilege. No one else in the community can keep a dog without paying a dollar a year for the privilege, to say nothing of the fact that he is compelled to pay that dollar to the defendant. We think this is an exclusive privilege condemned by the constitution.

The views we have expressed are not inconsistent with the recent decision in this court in *People v. New York Society for the Prevention of Cruelty to Children*, 161 N. Y. 233, 55 N. E. 1063. In that case the only question before the court was whether the defendant was an institution of "charitable, eleemosynary, correctional, or reformatory" character within the nomenclature of section 2, article 8, of the constitution, and, therefore, subject to the visitation of the state board of charities, a question not at all involved in this case. Nor is the result reached in conflict with the decision in *Trustees etc. Benevolent Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217, in which the validity of an appropriation of a percentage of the premiums received by foreign fire insurance companies to the relief of exempt firemen was upheld. The decision in that case proceeded on the ground that the volunteer fire department for more than a hundred years had been a recognized agency of the municipal ⁵²⁸ government, and that an appropriation of money to the benevolent fund of the firemen was but a recognition of the obligation due from the state to the members of the department for their services. Judge Finch there said: "The precise relation of these firemen to the municipality and the state it is not easy to describe. They were

not civil or public officers within the constitutional meaning (*People v. Pinckney*, 32 N. Y. 392), and yet must be regarded as the agents of the municipal corporation. Their duties were public duties; the service they rendered was a public service; their appointment came from the common council and was evidenced by the certificate of the city officers; they were liable to removal by the authority which appointed them, and were intrusted with the care and management of the apparatus owned by the city. They were, at least, a public body, and, perhaps, are best described as a subordinate governmental agency." It must be admitted that the status of these firemen was somewhat anomalous, and the description formulated by Judge Finch, "subordinate governmental agency," was doubtless the best characterization of it. But the case must not be considered as authority for the doctrine that the administration of government generally can be confided to "subordinate governmental agencies" in the shape of corporations or associations. One vital distinction between the fire department and the defendant is this: As to the former, membership in the department as well as its discipline and management were at all times subject to the control and regulation of the common council of the city, while membership in the defendant may be accorded or withheld at its pleasure, and the management of the corporation and the selection of its officers is wholly vested in the corporators.

The order granting a new trial should be affirmed and judgment absolute rendered for plaintiff on the stipulation, with costs.

Parker, C. J., O'Brien, Haight, and Werner, JJ., concur.

Gray, J., concurs on second ground stated in opinion.

Landon, J., not sitting.

Ordered accordingly.

CONSTITUTIONAL LAW.—A LICENSE FEE cannot be imposed upon persons while others of the same class or profession are exempt under similar circumstances and conditions: *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194. The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens, and not of others, when there is no public necessity for such discrimination, is unconstitutional and void: *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285.

SKINNER v. NORMAN.

[165 N. Y. 565, 59 N. E. 309.]

INSURANCE—UNKNOWN BREACH OF CONDITIONS—WAIVER OF.—It is possible to waive an unknown breach of the conditions of a contract of insurance equally with one that is known, when the failure of knowledge is due to the fault of the party on whom it is sought to impose the waiver.

INSURANCE—WAIVER OF RIGHTS—KNOWLEDGE OF FACTS.—One will not be held to have waived his rights under an insurance contract, unless it is shown that he has acted with a full knowledge of the facts, or that it was his bounden duty to know them.

INSURANCE—FIRE—ENCUMBRANCE—KNOWLEDGE OF AND WAIVER OF CONDITION AS TO.—If negotiations for insurance upon a steamboat, encumbered by a chattel mortgage, are made between a representative of the owner and the agent of the insurance company, and the owner's representative, upon being asked if there are any claims against the boat, answers that he knows of none, but that if there are any, the insurance agent can find out by inquiry of the owner, which inquiry the agent promises to make, but fails to do so, and the policy is subsequently issued without any reference to the chattel mortgage, which is not indorsed thereon or added thereto as required by one of its conditions, it is no defense to an action upon the policy for a loss that the chattel mortgage was not indorsed thereon or added thereto, for the defendant should not be allowed to plead ignorance of a fact as to which it agreed to obtain knowledge. The lack of inquiry of the owner as to encumbrances made that question immaterial, and having issued the policy without it, it was a waiver of the condition requiring such indorsement.

P. W. Cullinan, for the appellant.

A. H. Sawyer, for the respondent.

568 CULLEN, J. This action was brought to recover on a fire insurance policy on a steamboat. The substantial defense pleaded was that at the time of the issue of the policy the property was encumbered by a chattel mortgage, no reference to which was indorsed upon or added to the policy. That the boat was so encumbered, and that notice of the encumbrance was not indorsed upon the policy are conceded, and it is also conceded that these facts prima facie rendered the policy void. The plaintiff sought to relieve himself from a forfeiture of the policy by proof of the negotiations which took place between his agent and the defendant prior to the issue and delivery of the policy. The plaintiff sent the master of the boat, one Andrews, to effect the insurance. Andrews was not aware of the existence of the mortgage. He testified that on applying to the defendant's agent for insurance he was asked whether there were any claims

against the boat. He replied that he knew of none, but if there were any, he (the insurance agent) could find out at the custom-house or of Mr. Skinner (the plaintiff). "I said to him, 'You pass his house two or three times a day; you can stop in and see him if you don't happen to see him on the street,' and he said, 'All right.' . . . I asked him if everything was all right, and he said yes, he would attend to it; so I went back. . . . The policy was not delivered to me; it was sent to Mr. Skinner's house within two or three days after." The evidence of Wheeler, the defendant's agent, was in substantial accord with that of Andrews. He testified that he asked Andrews if there were any claims on the boat, to which the latter replied that he did not know, and that he (Wheeler) could go to Skinner (plaintiff) and find out. Wheeler further testified that afterward he did go to the plaintiff and that the plaintiff in substance told him there were no claims on the boat. This last statement the plaintiff denied, testifying that he did not see Wheeler until after the fire which destroyed the steamer. The policy was sent by the defendant to the plaintiff and the premium paid. A motion to dismiss the complaint made at the close of the evidence was ⁵⁶⁹ denied, and the court submitted the case to the jury under instructions that if the defendant's agent, after his conversation with Andrews, issued the policy without making inquiry as to the existence of claims or liens on the boat, the plaintiff was entitled to recover; but if he asked the plaintiff concerning such liens or claims and was told of none, the defendant was entitled to a verdict. The jury having found for the plaintiff, judgment was entered in his favor. From that judgment and an order denying defendant's motion for a new trial, an appeal was taken to the appellate division, which reversed the judgment and order and granted a new trial. On an application made by the plaintiff the order was amended so as to state that upon an examination of the facts the court decided that they sustained the verdict of the jury, but held that upon the facts as thus established as matter of law the plaintiff was not entitled to recover.

The main question presented on this appeal is very narrow. It is the settled law of this state that the agent of a fire insurance company may, by issuing a policy with knowledge of the facts, waive a condition that the policy shall be void if the property insured be encumbered, and a note of the encumbrance be not indorsed upon the policy, notwithstanding a provision in the policy that no agent of the company shall have power

to waive any such condition except by written indorsement: *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; *Robbins v. Springfield Fire etc. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159; though a different rule prevails where a change in the title or occupation of the property occurs subsequent to the issue of the policy: *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31. It is, therefore, entirely clear that had Andrews, the master of the boat, told the defendant's agent of the existence of the mortgage, the policy would have been valid despite of its failure to note the existence of the encumbrance. This doctrine the learned appellate division did not gainsay; but it held that the present case did not fall within the rule because the defendant's agent did not know that there was any mortgage on the property. The question presented, then, is whether ⁵⁷⁰ it is not possible to waive an unknown breach of the conditions of a contract equally with one that is known when the failure of knowledge is due to the fault of the party on whom it is sought to impose the waiver. In *Kirchner v. New Home etc. Co.*, 135 N. Y. 182, 31 N. E. 1104, the question arose as to the effect of a general release, and the trial court charged that the release did not cut off the plaintiff's right to recover for any injury to him or his property of which he did not know at the time he signed it. It was held that this direction was erroneous. It was there said: "It is competent for a party by his own act to forego a recovery for unknown, as well as for known, causes of action. If it is within the power of a party to release or assign rights of which he is ignorant, as well as those of which he has knowledge, I cannot see why the same principle is not equally applicable to the case of a waiver. In the first case the question is, What was the bargain between the parties and the construction of the instrument in which that bargain is expressed? In the second case the question is, What was the intention of the party, who it is claimed has made the waiver? Ordinarily, the rule is stated that one will not be held to have waived his rights unless it is shown that he has acted with a full knowledge of the facts, but precision requires the qualification "or where it was his bounden duty to know them": *Finley v. Lycoming County etc. Ins. Co.*, 30 Pa. St. 311, 72 Am. Dec. 705. In *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597, the plaintiff's agent, at the time of applying for a renewal or new policy, stated that he thought a change had been made in the conduct of the business, and referred the de-

defendant for information to another company who had recently made a survey of the property and insured it. It was there said: "The statement of the agent, therefore, that he thought a change of business had taken place, and a reference to where the fact could be ascertained, was equally effective as a notice of the very change that had been made. In such a case, whatever is notice enough to excite attention, and put a party upon his guard and call for inquiry, is notice of everything to which such inquiry might have led. ⁵⁷¹ When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." It is not necessary in order to uphold the recovery in this case to go to the full extent of the doctrine thus declared. We do not mean to suggest that the principles of constructive notice which obtain as to alleged bona fide purchasers of real estate, negotiable instruments, or the like, equally apply in the negotiations between an insurance company and an applicant for insurance. It is the duty of such applicant to comply with the conditions of the policy and to give the information requisite for its validity. The company may rely on the presumption that the insured has stated all the material facts, and as a rule is not bound to make inquiries. But, in the present case, the defendant's agent was told that the master of the boat did not possess knowledge or information of the condition of the owner's title, and voluntarily agreed to make necessary inquiry of the owner on the subject. It is true that he was under no obligation to make this inquiry, but he could assume the duty. The inducement for this agreement is plain. It was the desire to effect the insurance. Had the agent refused to make the inquiry, doubtless the master of the boat would have declined to take the insurance without apprising the owner. When the defendant's agent issued the policy without ascertaining from the owner whether the property was encumbered, he in effect determined that the existence of encumbrances was immaterial, and the defendant agreed to insure the property encumbered or unencumbered. It was the agent's failure to comply with his agreement which led the plaintiff into what was practically a trap, and the defendant should not be allowed to plead its ignorance of a fact as to which it has agreed to obtain knowledge. I know that it has been said by a distinguished judge "that illustration is not argument," but at times it is at least a very convenient substitute for it. If in the case of distant property the owner should state to the insurance company that he did not know

whether the premises were occupied or vacant at the time, I assume no one would deny that he might, by ⁵⁷² agreement with the company, obtain a valid policy of insurance if the indorsement "occupied or unoccupied" was made on the policy. If he stated truly his lack of knowledge on the subject of occupation and his desire to obtain insurance, notwithstanding that the premises might be unoccupied, I apprehend that the Wood and Robbins cases cited would be conclusive to the effect that a policy issued after such statement, containing no reference to the occupation, would be equally valid and effective with one in which reference to the occupation was noted. I cannot see why the case before us is not the same in principle as the one suggested. When the defendant's agent issued the policy without making the inquiry as to encumbrances, it was the same as if he had at the time given the policy to the master of the boat, stating it was immaterial whether the boat was encumbered or not.

The admission of the testimony of the plaintiff that he did not read the policy after it was sent to him did not prejudice the defendant, since, as we hold, it was not necessary to the validity of the policy that a reference to the mortgage should have been indorsed upon it.

The order of the appellate division should be reversed and the judgment entered upon the verdict of the trial term should be affirmed, with costs in all the courts.

Haight, Landon, and Werner, JJ., concur.

Parker, C. J., Gray and O'Brien, JJ., dissent.

Ordered accordingly.

INSURANCE—WAIVER OF CONDITIONS—INDORSEMENT ON POLICY—ENCUMBRANCES.—If any fact which would constitute a breach of a condition precedent to any liability of the company on a policy of insurance is fully known to its agent, local or general, who is authorized to consummate the contract of insurance, the agent's knowledge is the knowledge of the company, and his act in executing the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by it of such condition precedent and of the general requirement that waivers of conditions expressed in the policy shall be in writing indorsed thereon: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869. As to the waiver of conditions concerning encumbrances, see *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 65 Am. St. Rep. 611, 23 South. 183; *Phoenix Ins. Co. v. Fuller*, 53 Neb. 811, 68 Am. St. Rep. 637, 74 N. W. 269; *Arthur v. Palatine Ins. Co.*, 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

WRIGHT v. BOND.

[127 N. C. 39, 37 S. E. 65.]

MANDAMUS WILL NOT LIE TO COMPEL A SHERIFF to sell land liable to execution.

HOMESTEAD—EXECUTION.—A judgment debtor who has acquired an additional interest in real property after execution has been levied is not thereby deprived of his homestead exemption, and such acquisition is not a fraud on the creditor's rights, even though by docketing his judgment the creditor has acquired a lien upon the land.

Martin & Peebles, for the plaintiff.

Francis D. Winston, for the defendants.

39 FURCHES, J. The plaintiff has three judgments against one Henry, amounting to more than three hundred dollars, docketed in the clerk's office of the superior court of Bertie county on the eighth day of January, 1900, and therefore a lien on any land he may own, lying in Bertie county, for ten years from the date of docketing. The plaintiff has caused executions to be issued on said judgments, and placed them in the hands of the defendant, who is sheriff of said county of Bertie. At the ⁴⁰ time these executions were issued and placed in the hands of the defendant sheriff, the said Henry, defendant in said judgments, owned the remainder after the dower estate of his mother in thirty-one acres of land lying in said county. And it is agreed that said land is worth three hundred and three dollars and fifty cents, and that said Henry owns no other real estate; that the defendant levied said executions on said land, and advertised the same for sale there-

under, but before any sale was made the mother released and conveyed all her interest in said thirty-one acres of land to the defendant in said judgments, and he demands that his homestead exemption shall be laid off and assigned to him thereon. This the defendant proceeded to have done, and, there being no excess, declined to sell said land for the plaintiff's debts. The plaintiff thereupon brings this action, and asks the court to issue a writ of mandamus commanding the defendant to proceed to sell said land, and to apply the proceeds to his judgments. It seems to us that, if the plaintiff has a remedy against the defendant, it is not in this action. The executions themselves are commands to the sheriff to proceed to sell such property as the defendant Henry may have liable to execution and sale. And if he has not done this, he and his sureties are liable by attachment, and in an action upon his bond; and there is no allegation or suggestion that the defendant is insolvent or that his bond is not good. And, as a matter of law, we know that the plaintiff's lien continues for ten years, and longer, if he is prevented from enforcing it on account of the homestead; that while the writ of mandamus will issue in proper cases to compel public officers to perform ministerial duties, it must be in cases where the party asking it does not have the ordinary legal remedies by which he can have redress for his wrongs: *Hughes v. Commissioners*, 107 N. C. 598, 12 S. E. 465. But from the argument of counsel it would seem that it was expected that we should decide whether ⁴¹ the defendant Henry was entitled to have his homestead in this land; and while we cannot admit that this question is properly before us, it may be not improper for us to express our opinion upon this question. The plaintiff admits that if the defendant Henry had acquired his mother's life interest in this land before he docketed his judgment, he would be entitled to his homestead. But he contends that under the ruling of this court in *Murchison v. Plyer*, 87 N. C. 79, the defendant Henry would not have been so entitled at the time he docketed his judgments, and the acquisition of the life estate after that time was a fraud on his rights. This, it seems to us, would be to reverse the doctrine of frauds. The question of fraud is not unfrequently presented where a debtor disposes of his property. But no case has been called to our attention, and we do not think any can be found, where the creditor alleged fraud upon the ground that the debtor had acquired more property than he had when the debt was made or the judgment taken. The plaintiff, by dock-

eting his judgment, acquired no estate in the land. His docketed judgment was only a lien on the land, and he has that now. He has been deprived of no vested right, and we are at a loss to see what legal right he has been deprived of. The judgment below refusing the mandamus is affirmed.

EXECUTION.—MANDAMUS DOES NOT LIE to compel a sheriff to sell real estate levied upon by him under an execution upon an ordinary money judgment. Adequate legal remedies exist at law, in such case, against the sheriff for his neglect of duty: *State v. Cone*, 40 Fla. 409, 74 Am. St. Rep. 150, 25 South. 279.

HOMESTEAD.—ON WHAT MAY BE EXEMPT as a homestead, see the monographic notes to *Pryor v. Stone*, 70 Am. Dec. 344-353; *Morgan v. Rountree*, 45 Am. St. Rep. 237-239; *Mertz v. Berry*, 45 Am. St. Rep. 383-389.

LUTON v. BADHAM.

[127 N. C. 96, 37 S. E. 143.]

STATUTE OF FRAUDS—PAROL CONTRACT TO SELL LAND—PLEADING.—A parol contract for the sale of land is not a void contract, but voidable, and in a suit to enforce it the vendor may avoid it either by pleading the statute of frauds or denying the contract.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—PAROL SALE OF LANDS—IMPROVEMENTS.—One who enters upon land under a parol contract to convey, and who places valuable and permanent improvements thereon, has an equitable cause of action against the vendor who repudiates the contract and refuses to convey. While such contract cannot be specifically enforced, the vendor is liable to the vendee for the value of the improvements.

VENDOR AND PURCHASER—PAROL SALE OF LANDS—RECOVERY FOR IMPROVEMENTS—POSSESSION.—The right of a purchaser who has entered upon land under a parol contract and made valuable and permanent improvements to enforce payment for such improvements is based upon fraud, and not upon possession; hence a purchaser may recover the value of such improvements even though he is out of possession.

VENDOR AND PURCHASER—PAROL CONTRACT—IMPROVEMENTS—EVIDENCE.—That a person was induced to place valuable permanent improvements upon land by reason of a promise to convey the same to him, may be proved by parol evidence when the vendor denies the contract.

Busbee & Busbee, for the plaintiff.

Pruden & Pruden and Shepherd & Shepherd, for the defendant.

⁶⁶ **FURCHES, J.** The plaintiff is the administratrix of Alexander Badham, her former husband, and the defendant is

the father of her intestate. The plaintiff alleges that the defendant was the owner of a vacant lot in the town of Edenton, and upon the marriage of her intestate the defendant proposed to him that, if he would build upon and improve said vacant lot, it should be his; that he would make him a fee simple title to it; that upon this agreement her intestate entered upon said lot, and greatly improved the same, by erecting a dwelling and other outhouses thereon, which improvements ⁹⁷ greatly enhanced the value of said lot, to the amount of four hundred dollars; that her husband and intestate lived on said lot in the dwelling-house he had built with the plaintiff, his wife, from 1892 until 1897, when he died, leaving the plaintiff and two children, the result of their marriage; that plaintiff continued to occupy said house and premises for some time after the death of her intestate, when she surrendered the possession to the defendant upon his request, and upon his promise to give her a part of the rent for the benefit of her said children, but that since the defendant has gotten possession of said property he refuses to pay her any part of the rent, and refuses to convey said land to her children; that said contract and agreement between her intestate and the defendant was never reduced to writing, her intestate having full confidence in the defendant, and believing that he would keep his said promise, and convey him the lot; that said contract and agreement being in parol only, and the defendant refusing to carry out the agreement and convey said property, the plaintiff asks that he may be decreed to account and pay for the valuable and permanent improvements her intestate put upon said lot.

The defendant answers, and admits that the plaintiff's intestate was his son; that he went upon said lot and occupied the same with his family until his death; and that he built some small house for his use while there, but not the dwelling-house which defendant alleges he built. But he denies that there was any agreement between him and plaintiff's intestate that, if he would go upon said lot and improve it, he would convey said lot to the plaintiff's intestate, and denies that he said anything to said intestate to induce him to improve said lot with the expectation that he would convey the same to him; that, as the intestate was his son, he simply permitted him to occupy said lot without rent, and defendant admits a ⁹⁸ demand for title, and for an account and settlement for improvements, and that he has refused the same, but he did not formally plead the statute of frauds.

Upon the trial the court formulated issues as to whether there was a parol contract or agreement between the defendant and intestate that, if intestate would improve said lot, defendant would make him a title to it, and, if there was, did plaintiff's intestate, in pursuance of said agreement, enter upon said lot and place valuable permanent improvements thereon. Upon these issues the plaintiff introduced Isaac Owens and other witnesses, and asked them if they ever heard the defendant say how it was and under what circumstances the plaintiff's intestate entered upon, improved, and occupied said lot, stating that the purpose of asking these questions was to prove that there was such a parol contract between the defendant and intestate as that alleged in the complaint. The defendant objected, objection sustained, and the witness was not allowed to answer. Plaintiff thereupon submitted to a judgment of nonsuit and appealed. This is the case, and the only question presented for our consideration is as to the competency of this evidence.

It would seem that *Sain v. Dulin*, 59 N. C. 195, and *Dunn v. Moore*, 38 N. C. 364, cited by the defendant, sustain the ruling of the court. But the question has been before the court a great number of times, and we must admit that the opinions do not appear to be always in harmony. A parol contract for the sale of land is not a void contract, but voidable, upon denial or a plea of the statute of frauds: *Thomas v. Kyles*, 54 N. C. 302; *Gulley v. Macy*, 84 N. C. 434. But when the alleged contract is denied, or the statute of frauds pleaded, this avoids the contract, because the party alleging it is not allowed to show by parol evidence what the contract was. The English rule seems to have been that the statute⁹⁹ of frauds must be pleaded, or the party would be allowed to proceed with parol evidence to establish the contract. But our courts have extended the rule so as to include a denial of the contract as well as by pleading the statute of frauds: *Gulley v. Macy*, 84 N. C. 434, and many other cases. Whether it would not have been better that we had followed the English rule is not now an open question, as the rule seems to be firmly established the other way in this state.

But the plaintiff contends that she is not claiming the right to establish—to set up—a parol contract; that she is not asking a specific performance, nor is she asking damages for the breach of a parol contract; that her contention is that, by reason of the contract or agreement between her intestate and the

defendant, the intestate was induced to enter upon the defendant's land, and place permanent and valuable improvements on the same; and that this is a new cause of action, collateral to the contract, based upon a new consideration given by equity to prevent fraud. If the plaintiff is entitled to maintain this action against the defendant, it is purely upon equitable principles. Before the junction of the jurisdiction of law and equity in the same court, a bargainee, in a parol contract for the sale of land where the contract was repudiated by the bargainor, could not have relief against the bargainor in a court of equity, if legal demands alone were involved. If the bargainee had paid the purchase price, or a part of it, in money or specific personal property, he had a right of action at law to recover the same back. And a court of equity would not aid him, unless there was something else connected with the transaction that gave him an equity. Then the court of equity, having acquired jurisdiction of the matter, would proceed to investigate and settle legal as well as equitable demands: *Chambers v. Massey*, 42 N. C. 286. But no such question as this can¹⁰⁰ arise now, as the same courts have both jurisdictions, and administer both law and equity.

If the plaintiff's intestate entered upon the defendant's land under a parol contract, and placed valuable and permanent improvements thereon, and the defendant, after such improvements were made, repudiates the contract, and refuses to convey, the plaintiff has an equitable cause of action: *Ellis v. Ellis*, 16 N. C. 345; *Albea v. Griffin*, 22 N. C. 9; *Lyon v. Crissman*, 22 N. C. 268; *Pitt v. Moore*, 99 N. C. 85, 6 Am. St. Rep. 489, 5 S. E. 389; *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169; *Chambers v. Massey*, 42 N. C. 286; *Thomas v. Kyles*, 54 N. C. 302; *Love v. Neilson*, 54 N. C. 339, and many other cases. The court says in many of these cases that it would be against equity and good conscience to allow the bargainor to repudiate his contract, and thereby to reap the benefit of the bargainee's money and labor.

But it is contended by the defendant that if this is so, the defendant is protected from any liability to account, for the reason that he has denied the contract, and the law will not allow the plaintiff to prove it. And this is admitted to be true, so far as establishing the contract for the purpose of enforcing a specific performance, or the recovery of damages for a breach thereof. But cannot the plaintiff prove there was a contract under which her intestate was induced to enter

and put valuable improvements on the land? If she cannot, the fraud upon which the plaintiff's action is based is protected by the simple answer of the defendant. This, it seems to us, cannot be and is not the law in this state. In *Albea v. Griffin*, 22 N. C. 9, which seems to be regarded as the leading case, it does not distinctly appear that the defendant denied the contract, and, if he did not, certainly no stress is put upon that fact by the learned judge who wrote the opinion. The opinion in *Albea v. Griffin*, 22 N. C. 9, was written by ¹⁰¹ Judge Gaston at June term, 1838, and at June term, 1839, he wrote the opinion in the case of *Lyon v. Crissman*, 22 N. C. 268, in which he uses this language: "If the objection be that the agreement is void because not reduced to writing, and this objection could avail anything, it should have been set up in the pleadings. But this has not been done. The plaintiff avers one agreement, and the defendant sets up another, and the parties have left to proof which representation is the true one." *Ellis v. Ellis*, 16 N. C. 345, was an action for specific performance of a parol contract for the sale of land, and alternate relief was demanded for betterments. The answer denied the contract, and the court held that it could not be specifically enforced, but allowed evidence, and ordered an account as to rents and profits and for betterments. In *Pitt v. Moore*, 99 N. C. 85, 6 Am. St. Rep. 489, 5 S. E. 389, which was an action on a parol contract for betterments, where the defendant did not admit the contract as alleged, and set up a different contract or state of facts to those alleged by the plaintiff (and this was an action by the personal representative), and the plaintiff was allowed to prove the agreement, and the court granted the relief prayed for and ordered an account to be taken, in the opinion of the court the following language is used: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 21 N. C. 381, in which there was a divided court, but *Ruffin, C. J.*, and *Gaston, J.*, concurring, and *Albea v. Griffin*, 22 N. C. 9, by a unanimous court, to *Hedgepeth v. Rose*, 95 N. C. 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property ¹⁰² thus improved and enriched, without compensation for the additional value which these improvements have conferred upon the prop-

erty, and rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own acts." This was an action by the personal representative. *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169, is to the same effect as *Pitt v. Moore*, 99 N. C. 85, 6 Am. St. Rep. 489, 5 S. E. 389, where plaintiffs brought an action for possession of land, and defendants answered, setting up a parol contract of purchase by their ancestor, alleging permanent improvements, and asking payment for the same. The plaintiffs replied, denying the contract and defendants' right to have pay for improvements. But the court allowed evidence to be introduced to establish the parol contract, which the jury found to have been made by defendants' ancestor, and the court ordered a reference as to rents and profits and improvements, and this court affirmed the judgment. *Thomas v. Kyles*, 54 N. C. 302, is a case where the plaintiff alleged that his intestate made a parol contract with the defendant for the purchase of land, entered upon and took possession thereof, and put valuable improvements on the same. The defendant answered, denying the contract. But the plaintiff was allowed to prove the contract by parol evidence, and, while the court refused to compel a specific performance, the plaintiff's claim for betterments was allowed. Other cases might be cited as authority for the admission of parol evidence to show that the party entered and placed valuable improvements on land under a parol contract or promise to convey, but we do not deem it necessary to do so. It seems to be settled by this court that it may be done; and the cases cited show that where a party is induced to go upon land, and put valuable improvements thereon, by the owner thereof, upon a parol promise to convey the same to the party putting ¹⁰³ the improvements on the land, and the owner afterward refuses to convey, it is held by this court to be a fraud upon the party so induced, and the court will compel him to pay for such improvements.

It was also contended for the defendant that the right to have pay for improvements only exists while the bargainee is in possession, and *Albea v. Griffin*, 22 N. C. 9, and *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228, were cited as authority for this position. But neither of these cases, nor any other case that has been called to our attention, supports this contention. In these cases and other like cases, the bargainee being in possession, the court said that such bargainee should not be turned out until the bargainor paid for the improvements. This was

only a means resorted to by the court to enforce the bargainee's recovery, and not as the grounds of the plaintiff's equity, which was made distinctly to rest upon the fraud of the bargainor; and it would be just as fraudulent and unconscionable for the bargainor to take profit by means of such fraud, if the bargainee was out of possession, as if he was still in possession. It is the fraud that gives the right of action, and not the possession. But the cases of *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169, *Pitt v. Moore*, 99 N. C. 85, 6 Am. St. Rep. 489, 5 S. E. 389, *Thomas v. Kyles*, 54 N. C. 302, and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228, that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin*, 22 N. C. 9, was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228, that conflicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, in which case it is held that the bargainee was entitled to an account, and that if anything should be found in her favor, it should be a ¹⁰⁴ lien on the land. It may be that this judgment was given owing to the peculiar circumstances of that case. But from the authorities cited, and the strong equitable reasons appealing to our consciences for redress against a fraud, we are of the opinion that the evidence should have been admitted; and if it shall be found on the trial that the plaintiff's intestate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

Error. New trial.

DOUGLAS, J., DISSENTED on the ground that a vendee's claim for improvements is purely a defensive remedy, and that such a claim cannot be entertained after a surrender of the premises, citing section 473 of the code, and *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 180. He states that no case in North Carolina can be found

where a vendee in parol has recovered for improvements after his surrender of possession, and cites *Sain v. Dulin*, 59 N. C. 195, and *Dunn v. Moore*, 38 N. C. 364, as being against the plaintiff's contention. Continuing, the justice says: "In *Tucker v. Markland*, 101 N. C. 422, 8 S. E. 169, the court distinctly states the principle of its decision in the following words: 'It would be inequitable and against conscience to allow the latter to turn him [the vendee] out of possession thereof without restoring his outlay in cash and for valuable improvements he put on the land while so in possession. . . . Shall the court allow the vendor to keep the money of the vendee, which he thus obtained, while it helps him to get possession of the land? Surely not. The court of equity will not enforce the contract because the statute pleaded renders it void, but it will not help the vendor to consummate a fraud.' In *Albea v. Griffin*, 22 N. C. 9, the leading case upon the subject, this court says: 'If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.' To the same effect is *Pass v. Brooks*, 125 N. C. 129, 34 S. E. 228. In the very nature of things, what other remedy can be given without violating the letter and spirit of the statute? In the case at bar the court cannot say: 'We will prevent the vendor from taking back his land without just compensation; we will not help him to commit a fraud.' The vendor asks no help. His fraud is an accomplished fact. He is in possession of his land, and simply asks to be let alone. What then can we do? We cannot decree specific performance, nor can we put the plaintiff back in possession of the land which she voluntarily surrendered.

"But it is said we can render an affirmative judgment for the amount of the improvements. In what way? Not in contract, for there was no agreement that the vendor would pay for the house. Not for breach of contract, for the only contract between them was one that lies under the ban of the law. Such a contract cannot even be proved, much less enforced. It is true the vendee in possession may prove a parol contract of sale as showing the nature of his possession, but not as the sole ground of affirmative relief. This seems to be clearly recognized in *North v. Bunn*, 122 N. C. 766, 29 S. E. 776, an action in the nature of ejectment. There the court says: 'The contract for the conveyance of the land in dispute, being in parol and denied, cannot be enforced by reason of the statute of frauds. When the contract is denied, the court cannot hear proof of a void contract': Citing *Dunn v. Moore*, 38 N. C. 364. Further on the court, referring to compensation for improvements, says: 'This relief is not founded upon the existence of any contract sought to be executed, or for the breach of which compensation or damages were asked. It is an appeal to the court to prevent fraud.' "

McCracken v. McCracken, 88 N. C. 272, was the only case found by the justice in which a vendee asked for compensation for improve-

ments after he had surrendered possession, and the right was absolutely denied by a majority of the court, the opinion stating that in no case "is there even a suggestion to be found that an action can be sustained in any form, or in any court, whether at law or in equity, for damages for nonperformance of such a contract; and that is simply what this action is—nothing more nor less. To permit it to be done would be for the courts to act in the very teeth of the statute, in defiance of the declared will of the legislature. . . . There is much in the case at bar that appeals to our moral sensibilities," continues the dissenting opinion, "but not to our equitable jurisdiction. We must remember that such jurisdiction attaches where there is no adequate remedy at law, but not where the contract is forbidden by law. There is a clear distinction between the illegality of a contract and the inadequacy of a legal remedy, as much so as there is between the statement of a defective cause of action and a defective statement of a cause of action. In one case the defect is in the substance; but in the other merely in the accident." Parol contracts of the character in question are enforced in many states under the principle of part performance; but this doctrine is repudiated in North Carolina.

PAROL CONTRACTS TO CONVEY LAND are generally regarded as voidable merely: *Sims v. Hutchins*, 8 Smedes & M. 328, 47 Am. Dec. 90; and although they cannot support either a bill for specific performance or an action for damages (*Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 77 Am. St. Rep. 46, 25 South. 709), purchasers under such contracts may have compensation for improvements placed on the land: *Jordan v. Greensboro Furnace Co.*, 126 N. C. 143, 78 Am. St. Rep. 644, 35 S. E. 247; *Pitt v. Moore*, 99 N. C. 85, 6 Am. St. Rep. 489, 5 S. E. 389.

PLEADING THE STATUTE OF FRAUDS is the subject of the monographic notes to *Jordan v. Greensboro Furnace Co.*, 78 Am. St. Rep. 648-658; *Hotchkiss v. Ladd*, 86 Am. Dec. 684-688.

ARRINGTON v. ARRINGTON.

[127 N. C. 190, 37 S. E. 212.]

DIVORCE—JUDGMENT IN ANOTHER STATE—RES JUDICATA.—UNDER THE UNITED STATES CONSTITUTION, article 4, section 1, requiring full faith and credit to be given in each state to the judicial proceedings of every other state, a decree for divorce and alimony made in one state by a court having jurisdiction of the subject matter and the parties is *res judicata*, and binding on them in an action on the judgment in another state.

JUDGMENTS—RES JUDICATA—FAILURE TO SERVE PROCESS—NONAPPEARANCE.—Where a defendant is not served with legal notice, and is not present in person or by attorney, a judgment obtained against him is a nullity in another state.

STATUTE OF LIMITATIONS—JUDGMENT IN ANOTHER STATE.—In an action on a judgment obtained in another state, the plea of the statute of limitations is a plea to the remedy, and the *lex fori* governs.

STATUTE OF LIMITATIONS—ANNUAL PAYMENT OF ALIMONY—WHEN BARRED.—The statute of limitations does not run against a judgment debt before it is due; hence, under a ten year statute of limitations, an action on a judgment decreeing the annual payment of alimony is barred only as to those payments which became due and collectible more than ten years before the institution of the action.

Douglass & Simms, for the plaintiff.

B. H. Bunn and F. S. Spruill, for the defendant.

191 FAIRCLOTH, C. J. It appears from the record in this case that the plaintiff and defendant were married in North Carolina about 1869, and that they lived together as man and wife in said state until the year 1879, when the plaintiff removed to the state of Illinois and acquired a residence in that state, the defendant remaining a citizen of North Carolina until the present time. It also appears that the plaintiff, after acquiring her legal residence in the state of Illinois, about 1879 or 1880 instituted an action or bill for divorce against the defendant in the circuit court of Sangamon county, in said state of Illinois (a court of competent jurisdiction), alleging facts and matters, such as the violence and cruel treatment of her husband, as would entitle her in North Carolina to a divorce *a mensa et thoro*, which matters are adjudged in the state of Illinois sufficient to authorize a decree of dissolution of the bonds of matrimony; that is, a divorce *a vinculo*. After notice by publication, etc., the defendant appeared in said proceeding by an attorney, and in November, 1881, it was adjudged and decreed in said proceeding that the plaintiff be divorced and separated from the bonds of matrimony theretofore existing between her and her husband, the defendant therein, and that she have the care, custody, and education of their children. It was also adjudged that the defendant pay to the complainant for her alimony and maintenance annually the sum of one hundred and fifty-four dollars, until the further order of the court (said payments beginning and **192** dating from June 1, 1879, and to be payable semi-annually), and that the defendant also pay annually to the complainant three hundred dollars for the care, custody, support, and education of their children, payable semi-annually until the further order of the court (said last payment to begin and date from June 1,

1879). The plaintiff, now a resident of North Carolina, brought this action to recover the amount due on said Illinois judgment, alleging nonpayment of the same, and files a duly authenticated transcript of said record and judgment in this action. The effect of this judgment on the property rights of the plaintiff was before this court in 1889, in *Arrington v. Arrington*, 102 N. C. 491, 9 S. E. 200, and it was held that said Illinois judgment of divorce was valid and binding. In the present action, among other defenses, the defendant relies on the statute of limitations. At the trial, when the pleadings were read, his honor was of opinion that the plaintiff's action was barred by the statute, and thereupon the plaintiff took a nonsuit and appealed.

It is admitted that by the law of Illinois alimony may be allowed when an absolute divorce a vinculo is granted. We might dispose of this appeal on this simple ruling, but another question is important to be settled and understood, to which the arguments were chiefly addressed, and we feel that it is proper to consider it. That question is, What is the force and effect of said judgment when sued upon in North Carolina, where both parties now reside? Is it *res adjudicata* and binding on the parties, or can the defendant now plead to the merits of the original cause of action? This depends upon the construction given to article 4, section 1, of the constitution of the United States, in these words: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And Congress may, by general laws, prescribe the manner in ¹⁹³ which such acts, records, and proceedings shall be proved, and the effect thereof." By the act of May 26, 1790, chapter 11, Congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared that "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." At common law the judicial proceedings, etc., of foreign nations are not taken notice of nor admitted as of course by our courts. They must be proved like other facts when brought into controversy in any suit. Whatever regard for them has been shown is the result of treaty or mere comity. In the American colonies, before the adoption of our constitution, there was no uniform rule as to judgments in other colo-

nies. Some of the colonial courts held these judgments conclusive; some held that they were not; some, that they were *prima facie* valid, open to be controverted by new proofs, etc. So that there was little or no extraterritorial force or effect given to foreign or domestic judgments. The latter were uniformly held conclusive on the parties in the colony or state in which they were rendered, and not open to be controverted or impeached with new proofs. No one will fail to see how inconvenient this system, before the adoption of our constitution, must have been, and the attending danger of the grossest injustice. Suppose a judgment in one state, in a court having jurisdiction, after a trial and verdict by a jury upon a contract, or for a trespass or other just cause of action, in a place where all the witnesses lived, and after awhile the defendant should reside in another state, and material witnesses should die or remove, so that their testimony could not be had, and the defendant in a new suit could controvert ¹⁹⁴ anew all the facts found by the jury in the original suit, and so again and again; there could be no certainty of any just redress to the plaintiff. It must have been the purpose, therefore, of the constitution (article 4, section 1), with appropriate legislation, to suppress this irritation and mischief between citizens of different states, by declaring that full faith and credit should be given to the judicial proceedings, etc., of every other state. Any other interpretation would give no efficacy to that clause, and leave suitors in the same condition as they were before article 4, section 1, was adopted.

In 1813 the question was presented to the supreme court of the United States in *Mills v. Duryee*, 7 Cranch, 481, and it was held that "nil debit is not a good plea to an action founded in a judgment of another state." There a valid judgment had been rendered in New York state, and upon the certified copy a suit was instituted in the District of Columbia. Story, J., for the court, said: "It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature (*viz.*, record evidence), it must have the same faith and credit in every other court. Congress has therefore declared the effect of the record by declaring what faith and credit shall be given to it.

. . . . Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another state to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same state where the judgment was rendered. But it has no foundation. The right of a court to ¹⁹⁵ issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect, independent of the right to issue execution. . . . A decree for the pay of alimony, like any other money decree, may be collected by execution, where the decree does not provide for its being executed by a master in chancery, or a commissioner. An execution may issue precisely as upon a judgment at law": *Dinet v. Eigenmann*, 80 Ill. 274. In 1818 the question came up in *Hampton v. McConnell*, 3 Wheat. 234, where Marshall, C. J., said: "This is precisely the same case as that of *Mills v. Duryee*, 7 Cranch, 481. The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." The same conclusion is repeated in *McElmoyle v. Cohen*, 13 Pet. 312, *Christmas v. Russell*, 5 Wall. 303, and *Cheever v. Wilson*, 9 Wall. 123, and others.

The question and the authorities are reviewed in *Barber v. Barber*, 21 How. 582. The parties resided in New York, where a decree of separation a mensa et thoro was entered. It was also adjudged that, for the purpose of maintenance of Mrs. Barber, there should be allowed and paid to her by the defendant, in quarterly installments, the annual sum of three hundred and sixty dollars in each and every year, from the day the bill was filed, during her life, and in case it was not so paid, the quarterly payments should bear interest as they respectively became due, and that execution might issue therefor, toties quoties. It was also decreed that the defendant should pay forthwith nine hundred and sixty dollars, being the alimony retrospectively due, and the plaintiff should have execution therefor. Soon after the decree of ¹⁹⁶ divorce and for alimony was made the defendant removed to the state of Wisconsin, without paying any of the alimony due; and upon a duly authenticated transcript of the papers in that suit, a suit was instituted in Wisconsin for the amount of the alimony due

by the defendant. The case went to a hearing on the pleadings and proofs, and a judgment was entered in favor of the plaintiff according to the judgment in New York; and on appeal the supreme court of the United States held that the court of Wisconsin had committed no error in sustaining its jurisdiction, nor in the decree which it had made. In this case the court remarks: "The parties to a cause for a divorce and for alimony are as much bound by a decree for both which has been given by one of our state courts having jurisdiction of the subject matter and over the parties as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree rendered in any state of the United States, the court having jurisdiction, will be carried into judgment into any other state, to have there the same binding force that it has in the state in which it was originally given." When the marital control and protection have been lost by a judgment of divorce, a decree for alimony "becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has ¹⁹⁷ in the state in which the decree was given. Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record until the decree has been recalled as any other judgment for money is": *Barber v. Barber*, 21 How. 595. This doctrine has been expressly declared in several of our states.

In the cases cited it appears that decrees for alimony due and collectible in futuro by installments annually are as efficacious and binding on the parties as if they were collectible as soon as they are recorded. From the authorities we have examined, it seems to be assumed that either party, upon a change of circumstances, may move in the court that made the decree to have the decree modified or discharged, as may seem proper in the opinion of that court. In harmony with the foregoing authorities are several cases in North Carolina: *Irby v. Wilson*, 21 N. C. 578; *Davidson v. Sharpe*, 28 N. C. 14; *Miller v. Leach*,

95 N. C. 229; *Walton v. Sugg*, 61 N. C. 98, 93 Am. Dec. 580. In these cases the conclusive effect of the judgment rendered in another state is recognized, holding that the record, properly authenticated, is the highest and most conclusive evidence. In all cases where the defendant is not served with legal notice, and not present in person or by attorney, the original judgment in another state is a nullity.

2. As to the statute of limitations: This, as we understand the record, is the only question on which his honor intimated an opinion. The plea of the statute, in an action in our state on a judgment obtained in another state, is a plea to the remedy, and consequently the *lex fori* must prevail in such an action: *McElmoyle v. Cohen*, 13 Pet. 312. That, in North Carolina, is the ten years statute: Code, sec. 152. The language is: "From the date of the rendition of said judgment or decree." That must refer to a judgment which is at once due and collectible. It cannot reasonably intend a judgment which in terms is not due and collectible until a ¹⁹⁸ future day, without presenting the absurdity of a statute barring or running against a judgment debt before the debt is due or collectible. We are of the opinion, therefore, that the annual sums adjudged in favor of the plaintiff which became due and collectible more than ten years before the institution of this action are barred by the code (section 152), and that those that became due within the ten years are not barred.

Error.

CLARK, J., DISSENTED upon three grounds: 1. That the laws of North Carolina do not recognize alimony after the grant of an absolute divorce. 2. That a judgment for the future payment of alimony and maintenance, being subject to modification by the court at any time, is interlocutory and not a final judgment, upon which alone an action can be brought in another state. Justice Clark approves and follows the case of *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, to the effect that "while a decree for alimony in a lump sum or past alimony is a final judgment, upon which an action can be brought in the courts of another state, a judgment for payment of alimony in the future is not such a judgment that action can be maintained upon it in the courts of another state." And 3. That the North Carolina statute of limitations bars an action upon a judgment or decree after ten years "from the date of the rendition of the said judgment or decree." The statute leaves no room for argument. The judgment, being rendered November 16, 1880, must be sued on within ten years from that date. "There is no exception in the statute as to judgments upon which

executions are to issue at stated periods thereafter, nor as to decrees in divorce, or any other kinds of decrees. The statute may be defective, in that it did not except some judgments from this limitation, or did not provide that, as to judgments framed like this, the statute should not run from the rendition of the judgment, but from the falling due of each payment. . . . We cannot be wiser than the law. The court has no legislative authority. It cannot put into the statute words which the law-making power did not put there, nor amend it because we may think the general assembly might have written the law differently if its attention had been called to this case, as to which our opinion might be at fault." Only the statute of North Carolina is applicable to the case: *McElmoyle v. Cohen*, 13 Pet. 312; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841.

A JUDGMENT FOR ALIMONY is a debt of record: *Conrad v. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58. It has extraterritorial value and force, and the courts of another state should give it full credit and effect: *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979.

FOREIGN DECREES OF DIVORCE are discussed in the monographic note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182-184.

THE STATUTE OF LIMITATIONS OF THE FORUM governs in an action upon a judgment of a sister state: *Van Santvoord v. Roethler*, 35 Or. 250, 57 Pac. 628 76 Am. St. Rep. 472; *Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 South. 640.

REIGER v. WORTH.

[127 N. C. 230, 37 S. E. 217.]

DAMAGES.—THE REMOTE CONSEQUENCES of an act do not generally make a person liable in damages.

DAMAGES—SALE OF WORTHLESS SEED.—The measure of damages for the sale of seed rice, where the article is guaranteed and proves entirely worthless, and it is too late to plant another rice crop, is the amount which was paid for the rice, the amount expended in the preparation of the soil and for planting the seed, and a reasonable rent for the land, less the amount for which the land might have been rented for some other crop.

E. K. Bryan, for the plaintiff.

Franklin McNeill, for the defendant.

²³⁰ MONTGOMERY, J. This action was brought by the plaintiff to recover damages of defendant on account of a breach of warranty, the form of the action being that formerly known

as "case." The plaintiff bought of the defendant a quantity of rice, which he alleged the defendant represented to be good seed rice, but which was in fact not good seed rice, and which failed to sprout after having been planted, ²³¹ although the land was well prepared. The plaintiff further alleged that it was too late, after he discovered that the rice was worthless for seed and had failed to germinate, to plant for another crop. The jury found these allegations of fact to be true. The plaintiff demanded judgment for the amount paid for the rice, for the amount he expended in preparing the land and in planting the rice, and for the amount of profit which would have been made by the plaintiff upon the anticipated crop had the rice sprouted. The following issues were submitted to the jury: 1. Was the rice sold by the defendant to the plaintiff warranted to be good seed rice? 2. If so, was it such as it was warranted to be? 3. If not, what damage has plaintiff sustained? The third issue was subdivided into: 1. Actual damages; 2. The loss of crop. The third issue was subdivided, as is stated in the case on appeal, to make a new trial unnecessary in case the supreme court should hold damages of crop were too remote and speculative. The jury responded to the first issue, "Yes," to the second, "No," and to the third (subdivision 1), "two hundred and eighty-four dollars," and to the second subdivision, "four hundred dollars," and judgment was rendered against the defendant for both amounts. The appeal of the defendant is from so much of the judgment as is contained in the amount which the jury found in response to the second subdivision of the third issue—for the loss of the crop.

The appeal, however, brings with it the question of the correctness of the submitting by his honor of the second subdivision of the third issue; of his receiving the testimony of witnesses as to the price of rice in the fall of the year 1898, the time when the anticipated crop would have matured; and as to the average yield of rice on such land as the plaintiff's and as the plaintiff had prepared; and of his instruction to the jury on the second subdivision of the third ²³² issue. That instruction was, after calling attention to the evidence and contentions of the parties, "that they would allow the plaintiff such a sum as they would find from the evidence his net profit on the crop would have been if there had been no breach of the warranty. This is the sum left after deducting expenses of preparing for and working said crop, housing and marketing the same." The matter involved in his honor's instruction to

the jury is the one to which all of the defendant's other exceptions point, and the discussion of the charge is, therefore, the discussion of them all. The question for consideration and decision, then, is, Can one who sells a farm product to a purchaser, the purchaser making known at the time of the purchase that he wants the article for seed with which to plant a crop, and who guarantees that the article which he sells is good for the purposes of seeding, be made liable in damages in case of the entire worthlessness of the article for seed purposes, discovered after the land has been prepared and the seed sown, and too late to plant another crop, for such an amount as a jury might find upon the testimony of witnesses to be the value of the crop which might have been gathered if the seed had been good, and a fair crop raised? Compensation is to be made to the one who sustains an injury in his person, in his property, or in his reputation. This is a general principle underlying the law of damages. And there is another general rule to the effect that the remote consequences of an act, or conjectural consequences, do not make a person liable in damages. Damages can be recovered against one only for the consequences of his act when those consequences are proximate or natural. Great difficulty had been found in all the courts in the proper application of these general rules to the peculiar facts of particular cases, and many of the reported cases are in hopeless conflict. The correctness ²³³ of his honor's instruction is supported by two English cases: *Page v. Pavey*, 34 Eng. Com. L. 628; *Randall v. Raper*, 96 Eng. Com. L. 84. In the first-named case there was a breach of warranty in the sale of wheat sold for seed. The wheat did not grow as it was warranted to do, and was of no value. The plaintiff, in his action for damages, was allowed to give in evidence of what the value of the crop might have been if it had grown, with the view to make out his damages. In the other case (*Randall v. Raper*, 96 Eng. Com. L. 84), the plaintiff had bought from the defendant, with warranty, a quantity of seed barley, represented to be Chevalier seed barley, and then resold it to another, who sowed it for Chevalier seed barley; and the same, not being Chevalier seed barley, produced much less and inferior crops of an inferior quality of barley than if the seed had been Chevalier seed barley. The plaintiff obligated himself to compensate his vendee to the extent of the difference between the value of the crop raised and the estimated value of what the crop of barley would have been worth if the seed had been as they had been repre-

sented to be, and then brought his action against the defendant for the amount he had paid his vendee. A verdict was had, with leave to the defendant to move to reduce it to the difference in the price between Chevalier seed barley and the seed barley which was delivered. The rule was refused. Lord Campbell said: "I am clearly of the opinion that in case the plaintiffs had paid the damages sustained by their vendees, compelled to do so for breach of a warranty similar to that given by the defendant to the plaintiffs, they would have been entitled to recover such damages as special damages in this action. It was a probable, a natural, even a necessary, consequence of this seed, not being Chevalier seed barley that it did not produce the expected quantity of grain. That is a consequence not depending upon the quality of the ²³⁴ soil, but one necessarily resulting from the contract as to the quality of the seed not being performed." Erle, J., said: "The question is, What amount of damages is to be given for the breach of this warranty? The warranty is that the barley sold shall be Chevalier barley. The natural consequence of the breach of such a warranty is that the barley which has been delivered having been sown, and not being Chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty, and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from Chevalier barley." In the case of *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136, the facts were that the defendants sold a quantity of cabbage seed to the plaintiff, representing the seed to be "Van Wycklan's Flat Dutch." That seed was well known in the market and had a good reputation. They were sown by the plaintiff and were totally unproductive of cabbage. It was held in that case that the law charged the defendant with a warranty that the seed sold and delivered was of the kind represented, and the plaintiff was allowed to show in damages the fair value of the crop that could have been raised had the seed been as represented. The cases in North Carolina upon this subject are not numerous, and the facts in each are so diverse that it is difficult to group any two under the same head, and they do not seem to be entirely harmonious. Under the head of remote damages, as distinguished from conjectural or uncertain damages, are the cases of *Sledge v. Reid*, 73 N. C. 440, and *Jackson v. Hall*, 84 N. C. 489. In the first of these cases the

plaintiff sued the defendant, who was sheriff of Halifax county, for wrongfully taking his mule. He was not allowed to recover for the loss of a part of his crop following the loss of the mule. It was held that such damage was not ²³⁵ the proximate consequence of the act complained of, but was the secondary result, and therefore too remote. The court said: "The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. The plaintiff might buy or hire another and finish his crop; and because he preferred to throw out a part of the crop he is not thereby enabled to claim damages for the loss as an immediate and necessary consequence of the tort." So that point in these cases was decided against the plaintiffs because the damage was remote, and not proximate. It was not decided against them because the damage was conjectural or uncertain in the measure of it. In the case of *Roberts v. Cole*, 82 N. C. 292, it appears from the case that the parties to the action agreed to build and keep in repair separate parts of a common division fence, which divided and protected their respective crops. The defendant violated his agreement, permitting his part of the fence to become rotten, whereupon hogs broke into the plaintiff's field and injured his crop. In the trial of the case his honor told the jury that if the fence was intended by the parties to guard their crops from the depredations of stock, the plaintiff was entitled to whatever he had expended in the renewing of the fence, and to have damages for the injury to his crops, and that the measure of his damage was the difference between what the crop undisturbed ordinarily would be and that which was made, diminished by the breaking in of the hogs. The court said: "While the court below very properly declined to restrict the plaintiff's claim to compensation for defendant's breach of contract, as requested, and correctly directed the jury to estimate and allow for the ravages of the hogs, the rule by which the measure of his injury was to be ascertained was too vague and uncertain to act upon. The value of the crop made is capable of definite ²³⁶ calculation, but what it would have made if it had not been interfered with—the other element in the proposition—is and must be purely and wholly conjectural." No precedents are referred to in that opinion on the point we have been discussing; that is, upon the question of allowing the plaintiffs in actions to give in evidence the value of crops that might have been grown and reaped. *Boyle v. Reeder*, 23 N. C. 607, *Foard v. North Carolina*

R. R. Co., 53 N. C. 235, 78 Am. Dec. 277, and Mace v. Ramsey, 74 N. C. 11, were referred to, but they referred to the loss of the profits of a business, or adventure other than farming or planting. But in the case of Bridgers v. Dill, 97 N. C. 222, 1 S. E. 676, the plaintiff was allowed to show that the stock of the defendant were allowed to depredate on his growing crop, the defendant repeatedly pulling down the fencing as the plaintiff would put it up again, and that, as a consequence, his crop was greatly damaged. He said: "They destroyed all but six bales of cotton. The damages were about twenty bales—fifteen, anyhow—fifty acres where I never picked out a pound; value, fifty dollars per bale. They damaged me seventy-five barrels of corn; value, four dollars per barrel." The court, in its instructions as to the damages, told the jury that they should not consider what the plaintiff might have raised upon the land, and that such evidence was excluded. This court said: "The exception to the evidence of Bridgers objected to by defendant cannot be sustained. The trespass was repeated as often as the plaintiff would put up his fence. It was a continued trespass, and the case is unlike that of Roberts v. Cole, 82 N. C. 292, where the damages were properly limited to such a sum as would repair and put the fence in order, and cover the injury done to the crop before the plaintiff knew of the trespass." It is difficult to distinguish the difference as to the legal principle involved between the last-mentioned case and the case of Roberts v. Cole, ²³⁷ 82 N. C. 292. However that may be, we have concluded, after mature reflection and a careful study of all the cases to which we were referred in the argument and which we have found in our investigation, that the principle laid down in Roberts v. Cole, 82 N. C. 292, applies, and that the plaintiff ought not to have been allowed to recover the amount estimated as the crop of rice which might have been produced upon the land if the rice had been good seed rice.

The plaintiff did not appeal from the judgment, and, ordinarily, we would have the judgment below reformed, striking out the amount allowed for the loss of the crop, and allowing it to stand for the amount found to be due by the jury under the first subdivision of the third issue; but, as we think, under all the circumstances of the case, the plaintiff is probably entitled, under a correct rule of estimating the damage he has sustained, to a larger recovery than for the amount expended by him in the preparation and planting of the land and the value of the rice, we think it but just to him to declare error

in the instruction and send the case back, that it may be tried anew. We think the true rule for the measure of the plaintiff's damage in this case is the amount which he paid the defendant for the rice, the amount which he expended in the preparation of the soil for the crop and for the planting or sowing of the seed, and because it was too late to plant another crop of rice he ought also to recover a reasonable rent for the land—the forty-seven acres—for the year 1898, subject to be reduced, however, by such amount as the defendant may be able to show that the plaintiff could have rented the land for, after it was too late to plant or sow rice, to be put in other crops than rice. The costs of this appeal to be taxed against the plaintiff.

SALE OF SEED.—THE MEASURE OF DAMAGES for a breach of warranty on the sale of seed is the purchase money with interest and the expense of cultivation, not including prospective profits: *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508. Compare *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

SHOAF v. PALATINE INSURANCE COMPANY.

[127 N. C. 308, 37 S. E. 451.]

REINSURANCE.—AN INSURED HAS SUCH AN INTEREST IN A CONTRACT OF REINSURANCE that he may sue the reinsurer to recover a loss on property covered by his policy, though he is not a party to the reinsurance contract and such contract expressly provides that no such action can be maintained.

Watson, Buxton & Watson, for the plaintiffs.

Glenn & Manly and Burwell, Walker & Cansler, for the defendant.

308 FAIRCLOTH, C. J. Prior to October, 1898, the Merchants and Manufacturers' Fire Insurance Company, of Baltimore City, in the state of Maryland, issued its policies of insurance on the property of the plaintiffs in the town of Salem, North Carolina, with the usual stipulations and conditions, and received the premiums therefor from the plaintiffs. During the life of said policies, to wit, on October 4, 1898, the said Merchants' company and the Palatine Fire Insurance Company, of Manchester, England, doing business in this state,

entered into a written contract of reinsurance, in which the Palatine company agreed to reinsure all outstanding risks of the Merchants' company for loss or damage by fire, etc., on any property located in the United States and Canada, and assumed all liability under any outstanding policies or risks theretofore written by said Merchants' company, and on any policy or risk that might be written by the Merchants' company before November 1, 1898, the later business to be ³⁰⁹ for the benefit of, and under the direction of, the Palatine company, which company assumed all expenses and taxes connected therewith, and all said risks and policies are reinsured by the Palatine company. In consideration of such reinsurance the Merchants' company agreed to pay one-half of the unearned gross pro rata premiums on all policies in force on October 1, 1898, to furnish complete schedules of all policies, to retire from business, and to transfer and deliver its goodwill, right, title, and interest in its business, daily reports, indorsements, registers, and books of record to the Palatine company, except office fixtures, furniture, etc., with a provision of release on failure to perform the obligations of said contract. The tenth article of said reinsuring contract provides that it shall only be effective as between the parties thereto; that no holder of a policy in the Merchants' company shall be entitled to enforce this contract against the Palatine company; that the holders of such policies shall prosecute against the Merchants' company any claim arising under said policies; and the Palatine company "agrees to pay all such claims legally arising and duly proved; and further, in case of any contest arising in connection with, or suit being brought for or on, any such claim, said Palatine company agrees to defend the same, and pay all costs and expenses incident thereto." This agreement was signed by the two companies, and the plaintiffs were not parties thereto. Subsequently the insured property was destroyed by fire, and the plaintiffs, having performed the conditions of their policy, instituted this action against the Palatine company alone.

The question is, Can the plaintiffs, upon these facts, maintain their action? This question has not until now been before this court. There is some diversity of opinion in the decisions of the courts in our sister states and the general ³¹⁰ authorities. There is no question raised as to the validity of the insuring and reinsuring contracts, each being in due form, and supported by a valuable consideration. A policy of fire

insurance is a contract of indemnity (*Darrell v. Tibbitts*, L. R. 5 Q. B. Div. 560), and such contract gives the insurer an insurable interest in the property insured, coextensive with its liability: *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359. A contract of reinsurance seems to be a union and blending of the business of the two companies, presumably for the advantage of each party. The reinsurer absorbed the estate and rights of the reinsured, and assumed the risks and liabilities of the reinsured, with the privilege of the reinsured, in the present case, to continue issuing new policies for a time specified, with the same right and liabilities under the new policies as under those already outstanding; this to be done for the benefit of, and under the direction of, the defendant. The plaintiffs were neither a party to, nor in privity with, said contracts. The question is, Have they an interest in, or arising out of, the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured, at the same time, is bound to indemnify the plaintiffs for risk and loss. Does the defendant's liability inure to the benefit of the plaintiffs, and if so, can the plaintiffs directly enforce their claim for loss against the defendant? The unearned premium at the date of the contract was a part of the consideration passing to the defendant for its risk and liability assumed. In this unearned premium the plaintiffs had an interest at the time of the reinsurance.

The principle sanctioned by several respectable authorities is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract ³¹¹ against A, although C is not privy to the consideration received by A. The case before us seems to come within the same principle. Our code (section 177) provides that every action must be prosecuted in the name of the real party in interest, etc. In all the cases close attention is given to the language of the agreement. In the present case the defendant expressly assumes the liability in case of loss, but agrees to pay to the Merchants' company only after claims have been duly proved in an action against the Merchants' company. The defendant also agrees, in the event of such litigation, "to defend the same, and pay all costs and expenses incident thereto." We see no reason why the plaintiffs should be required to first sue the Merchants' company, and then, in case of that company's insolvency, have to sue the defendant on

its contract. The defendant has all the means and information necessary to make a just defense.

We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely on the ground that it has no contract with the plaintiffs. *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414, is decisive on this question. It does not appear clearly, either from the statement or the opinion, whether the promise was to pay the loss to the insured or the reinsured, but the reasoning in the opinion does not consider that matter material. It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action. The defendant relies on the provision in article 10 of its contract as a protection against any action of the plaintiffs against that company. If the plaintiffs have a right to sue the defendant, as we think they have, the two companies cannot, by any agreement between themselves to which plaintiffs are not a party, defeat that right.

³¹² There are numerous objections to evidence, exceptions, and prayers for instruction. Some relate to communications between plaintiffs' attorneys and Harris, the general agent, and Ballard, an assistant manager, of the defendant and the Merchants' company. These letters were written pending, and in connection with, the work of adjusting the loss caused by the fire, and have no material bearing on the present question. Carefully reading the evidence, we find no incompetent evidence admitted on any material matter. The issues found in favor of the plaintiffs dispose of most of the questions raised by the exceptions.

Another exception is the refusal of his honor to charge, on the third issue, "that there is no evidence of reinsurance by the defendant upon which it can be liable directly to the plaintiffs in this suit, and the jury will answer the third issue, 'No.' " Another exception is, that his honor refused to dismiss the action, on motion, under the Acts of 1897, chapter 109. These exceptions are met by what we have stated above. The defendant says, in its brief and oral argument, that "the first and leading question in the case relates to the right of the plaintiffs to sue the defendant upon the policies, and to the liability of the latter, even if a good cause of action upon the policies has accrued to the plaintiffs." That is the crucial point

in the case, and that we have considered. Our conclusion on that point, already stated, renders further investigation unnecessary.

Affirmed.

REINSURANCE IS SOLELY FOR THE BENEFIT of the insurer, and not of the policy holders, who have no interest therein and cannot sue thereon: *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314; but see the monographic note thereto, 45 Am. St. Rep. 447.

TURPIN v. CUNNINGHAM.

[127 N. C. 508, 37 S. E. 453.]

CHATTEL MORTGAGES—HORSE—CHANGE IN COLOR.—A mortgagee of a horse, who has done all the law required him to do, by specifically describing the animal in the mortgage and duly recording that instrument, does not lose his lien because of a subsequent change in the color of the horse, even though it has been sold to a party in another county who has no actual notice of the mortgage.

No counsel for plaintiff.

J. F. Ray and Ferguson & Son, for the defendant.

509 CLARK, J. One Ray, being indebted to the plaintiff, executed to him September 13, 1894, to secure the debt, a mortgage on a certain "bay horse, six years old, which I purchased of said Turpin." The mortgage was regular in all respects, and was filed for registration March 2, 1895, the horse being left in possession of the mortgagor. After the registration, and before the mortgage fell due, the mortgagor traded the horse to a party in another county, who had no actual notice of the mortgage; and after the mortgage fell due (September 13, 1895) the horse was traded from party to party until the defendant purchased him, in 1897, with no actual notice of the mortgage. "At the time and prior to the time the defendant purchased said horse, he had entirely changed color, from some natural or unnatural cause, until he was not a bay horse, but a white and sorrel spotted horse, without any appearance of bay whatever." The mortgagee had done all the law required him to do, when the horse was specifically described in the mortgage, and that instrument was duly recorded. There being no doubt as to the identity of the horse, the mortgagee does

not lose his right to subject the horse to the payment of the lien, because of the change in appearance, due, probably, to old age. A mortgage on pigs, calves, or other young animals is not vitiated by their growing up into boars, sows, bulls, and cows, and the like. Nor would a mortgage upon boars and bulls be destroyed by turning them into barrows and oxen, which would be a more substantial ⁵¹⁰ alteration than a change of color. The horse may shed his color, but a mortgage is not so easily shed. It usually sticks closer than the skin. In adjudging that the mortgagee could recover the horse, or his value if not produced, to be applied to the mortgage debt, there was no error.

CHATTEL MORTGAGE.—THE SUFFICIENCY OF DESCRIPTION of the property in chattel mortgages is the subject of the monographic note to Barrett v. Fisch, 14 Am. St. Rep. 239-247.

CHATTEL MORTGAGE.—CHANGES in personality as affecting the rights of parties to a mortgage thereon are considered in the monographic note to Gregg v. Sanford, 76 Am. Dec. 726, 727.

STATE v. COSTNER.

[127 N. C. 566, 37 S. E. 326.]

CRIMINAL TRIAL—EVIDENCE OF IDENTITY OF DEFENDANT.—Where the evidence as to the identity of the defendant in a criminal case is more than a scintilla, it should be received, even though it is little more than shadowy, and it is for the jury to pass upon its weight.

CRIMINAL TRIAL—FAILURE OF DEFENDANT TO EXAMINE WITNESS.—An attorney for the prosecution may comment before the jury on the failure of the defendant to examine a witness which he had subpoenaed for himself.

CRIMINAL TRIAL—FAILURE TO CALL WITNESSES—COMMENT BY ATTORNEY.—In a prosecution for burglary, where there is some evidence that the defendant, about the hour of the burglary, went to the house of one of the state's witnesses and spent the balance of the night, the attorney for the prosecution may properly comment before the jury on the failure of the defendant to call a witness to show where he spent the night.

Indictment for burglary.

R. D. Douglas, attorney general, for the state.

No counsel for defendant.

⁵⁷¹ **MONTGOMERY, J.** The defendant, whose character was said to be good by his employer on the trial, was convicted

of burglary in the second degree at the August term, 1900, of the superior court of Catawba county. The case, as we read it from the evidence, presents some peculiar phases. It appears from the evidence that the defendant was found lying or crouching on the floor, near the side of the bed in which one of the witnesses was sleeping, between 12 and 1 o'clock at night. There were three grown persons sleeping in the same room at the time. The windows were up. It is difficult to believe that the purpose of the defendant was to do any harm to the occupants of the room, and from the evidence, nothing was disturbed. The evidence as to the identity of the defendant, while more than a scintilla, was little more than shadowy. The two witnesses for the state who were occupants of the room did not claim to know the face of the defendant, and one of them did not know that the intruder ⁵⁷² was white or black, and both witnesses closed the testimony by saying—one, "I never claimed that I could swear that the defendant is the person who entered the house"; and the other, "I do not claim to have identified the man who was in the room." There was evidence, however, concerning the defendant's whereabouts on the night of the occurrence, which to some extent compromised the defendant, and which probably had undue weight with the jury; but with that we can have no concern.

The first exception of the defendant was to the receiving by his honor of certain evidence testified to by one of the occupants of the room. She had said that the man who entered the room was small of stature, without coat or hat, and that she knew defendant's figure, but not his face. She was asked by the solicitor: "What is your opinion, from what you saw of the man that night, as to who it was?" She answered: "The figure in the room that night compared more favorably with Wade Costner than anyone else I could think of in that community." That evidence was weaker than that which was allowed in the case of *State v. Lyttle*, 117 N. C. 799, 23 S. E. 476, to prove the identity of Lyttle. There the witness said, in substance, that it was so dark he could not tell whether the man whom he saw in the road was white or black; that he had his back to him; that he had known him ten years; that he was a low, chunky man; and that, if he had spoken to him, he would have called him Lyttle. But the evidence in the present case was more than a scintilla, and for that reason it has to be received.

The exception made by defendant's counsel to the refusal of his honor to instruct the jury that, upon all the evidence,

they should return a verdict of not guilty cannot be sustained. The evidence was not strong against the defendant, but there was evidence against him, and it was for the jury to pass upon its weight.

573 The defendant had subpoenaed as a witness for himself Brad Edwards, who was present at the trial. One of the attorneys who was assisting the solicitor commented before the jury on the failure of the defendant to examine this witness. His honor refused to interfere, and the defendant excepted. The exception is without merit. The point is settled in *State v. Jones*, 77 N. C. 520, and *State v. Kiger*, 115 N. C. 746, 20 S. E. 456. The solicitor commented upon the fact that defendant had able counsel, and had not brought a witness to show or explain where he spent that night, and the defendant's counsel asked his honor to stop the solicitor in his remarks, which request was refused. The comments of the solicitor were not out of place, for evidence had been introduced for the state tending to show that about the hour of the occurrence, or a little later, the defendant went to the house of one of the state's witnesses, and there spent the balance of the night—a thing which was most unusual with him—and that he was not at his own house that night. It is further testified to by one of the state's witnesses that on the next morning the defendant was asked by his employer where he had spent the night, and the defendant said, "At Uncle Eat's." The fact was, if Eaton Lawrence's (Uncle Eat's) testimony was true, the defendant spent only an hour or an hour and a half at his house, and that the defendant seemed tired and worried. *State v. Johnson*, 88 N. C. 623, is, in principle, in point on this exception.

No error.

Faircloth, C. J., dissents.

WITNESS, FAILURE TO EXAMINE.—In an action for personal injuries, if the defendant fails to examine as a witness one of its employes who was present at the time of the injury, the plaintiff's counsel may argue to the jury that such failure is a circumstance from which an inference may be drawn that if the employe had been introduced and examined, he would have testified to facts prejudicial to the defendant: *Western etc. R. R. Co. v. Morrison*, 102 Ga. 319, 66 Am. St. Rep. 173, 29 S. E. 104; but compare the note to this case, 66 Am. St. Rep. 183, where the principle is applied in a criminal trial. See, also, *Angelo v. People*, 96 Ill. 209, 38 Am. Rep. 132.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ADDYSTON PIPE AND STEEL COMPANY v. CORRY.

[197 Pa. St. 41, 46 Atl. 1035.]

MUNICIPAL CORPORATIONS — INDEBTEDNESS.—Municipal contracts, in so far as they affect the limitation of indebtedness, must be tested as of the time when made.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — LIMITATION UPON.—If a city has money on hand, or provides at the time a present means of raising it otherwise than by loan, it may contract for expenditures without restriction, as there is no constitutional limitation on municipal expenditure, provided the city pays as it goes. What is prohibited is the incurring of debt.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — LIMITATIONS UPON.—If a contract made by a city pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of a constitutional provision limiting the power of municipalities to contract debts.

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund to pay, a contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — CONTRACTS.—If a city, at the time of making a contract, levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood, or decline in values, the result is an insufficient fund, it cannot be held that the contract, good at its inception, is thereby rendered void, as in violation of a constitutional restriction on municipal indebtedness.

MUNICIPAL CORPORATIONS — INDEBTEDNESS — CONTRACTS.—If a city provides that the contract price of an improvement shall be paid partly by money on hand and partly by assess-

ments on abutting and nonabutting property, and the latter proves not liable to such assessment, the loss must fall upon the city, although the contract, as made, increased the city debt beyond the constitutional limitation.

C. G. Olmstead and J. W. Sproul, for the appellant.

A. B. Osborne, for the appellee.

⁴⁷ MITCHELL, J. The city of Corry formally contracted for the building of a sewer, the contractor performed the work, the city accepted it, and is in possession, but it now seeks to escape payment on the ground that its contract was ultra vires. If this is true, the overruling requirements of public policy compel us to hold the defense good in law, however unjust and dishonest in morals. But the invalidity of the contract should be clearly established, and the burden of showing it is on the city. This being a case stated, all facts not contained in it must be assumed not to exist, and the consequences must fall on the party having the burden of proof.

⁴⁸ The contract called for the building of a sewer for the price of fifty-seven thousand dollars, nine thousand three hundred dollars of which was to be paid out of the general sewer fund, and the remainder to be assessed upon the property benefited by the contemplated sewer. The city by ordinance appropriated the nine thousand three hundred dollars out of the general sewer fund and it was duly paid, so that it is only material to the present inquiry so far as it may bear upon the validity of the contract at the time it was made. By ordinance and proceedings in court the rest of the contract price was duly assessed upon the property benefited, including that which abutted on the line of the sewer, and some that did not. The city collected all of the assessments of the former class and many of the latter, and has paid out all the orders on the treasurer given to the contractor so far as the funds collected would go. But some owners of nonabutting property having resisted payment, the assessments of that class were held invalid, and the funds not being produced from the expected source, payment of the outstanding orders was refused and the holder brought this suit upon them.

At the date of the contract in 1891 it is admitted that the debt of the city of Corry was in excess of its constitutional limit, but several years having been consumed in the building of the sewer, the debt meanwhile had been so far reduced that the balance due on this contract could be paid without transgress-

ing the constitutional restrictions. On this point, however, the court below rightly held that the validity of the contract must be determined as of the time it was made. The question therefore is, Did this contract increase the debt of the city of Corry at the date of its execution?

As to the nine thousand three hundred dollars to be paid by the city out of the general sewer fund, there is nothing in the case stated to show that the amount was not then in the city treasury or payable and subsequently paid out of the current revenues. This item, therefore, did not increase the city's indebtedness in the prohibited sense. There is no constitutional restriction on municipal expenditure, provided it is paid as it goes. What is prohibited is the incurring of debt. If the city has the money on hand or provides at the time a present means of raising it otherwise than by loan, it may contract for expenditure without restriction. In *Appeal of Erie*, 91 Pa. St. 398, Gordon, J., quoting from *Grant v. Davenport*, 36 Iowa, 396, says: ⁴⁹ "When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts." And he adds: "If the contracts of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created." This is quoted with approval by our brother Dean in *Wade v. Oakmont Borough*, 165 Pa. St. 479, 488, 30 Atl. 959.

It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus if a city, at the time of making a contract, levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be

made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance.

In the present case the city of Corry provided the contract price of the sewer by an appropriation of money which, as already said, we must assume to have been in the treasury, and by assessments upon the property benefited. There is nothing to indicate that these assessments were not in good faith and reasonable expectation supposed to be adequate to produce the required fund and offered and accepted by the contracting parties in the mutual belief in their validity. So far as they were upon abutting property they fulfilled their intended purpose. The distinction in regard to nonabutting property had not then⁵⁰ been made, and was not in contemplation of either side. When it was determined that this part of the agreed means of payment would be unavailable, the loss should in equity and justice fall on the city, which has received the full consideration stipulated for, and to this extent paid nothing.

The cases on this subject are conflicting: See Dillon on Municipal Corporations, 4th ed., secs. 480-482, and notes. They show that there is no disposition of the question which is wholly free from difficulty. We have preferred to follow the line which we think not inferior in just legal reasoning, while clearly superior in the honesty and justice of the result reached.

There is another view of this particular case which leads to the same conclusion. As already said, the building of the sewer occupied several years. During the progress of the work differences arose in regard to payments, and in 1895 a compromise was agreed upon between the contractor and a committee of the city council, subsequently ratified by ordinance, whereby the outstanding orders in favor of the contractor were canceled, and new orders issued against which the city stipulated that no defense should be made by it. Among such new orders are those now sued on. The validity of the assessments on non-abutting property was then undecided. The contractor agreed to furnish additional counsel and aid in the prosecution of a test case on this subject, and to abate the sum of five hundred and fifty dollars from his claim, should such suit be decided against the city. This compromise was carried out by the parties except as to the payment of the orders involved in this suit. No reason is shown why it was not entirely valid and binding.

The case stated does not show that the stipulated payments on these orders could not at that time have been made from money in the treasury or from current revenue, even if that fact had been a necessary element in the validity of the compromise.

Judgment reversed and judgment directed to be entered for the plaintiff for six thousand dollars, with interest.

MUNICIPAL INDEBTEDNESS.—THE TIME when the indebtedness of a municipality is to be considered in determining whether the constitutional limitation has been exceeded is when the liability is incurred or created: See the monographic note to *Beard v. Hopkinstown*, 44 Am. St. Rep. 241; *Earles v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964. If a city has money to pay its indebtedness when it comes into existence without exceeding its constitutional limit, there is no violation of the constitution: *Laporte v. Gamewell etc. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588.

MUNICIPAL INDEBTEDNESS.—IF THE CURRENT REVENUES of a city are sufficient to fully pay its current expenses, no indebtedness is created; but a debt cannot be incurred beyond the constitutional limit, even for current expenses, no matter how urgent: *Laporte v. Gamewell etc. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588.

MUNICIPAL INDEBTEDNESS—STREET IMPROVEMENTS.—Bonds issued for street improvements, payable only out of funds to be raised from assessments on the abutting property, do not constitute an indebtedness within the constitutional inhibition: See the monographic note to *Beard v. Hopkinstown*, 44 Am. St. Rep. 237.

PURDY v. WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY.

[197 Pa. St. 257, 47 Atl. 237.]

MASTER AND SERVANT — DEFECTIVE APPLIANCES.—To be relieved from liability for injuries received by a servant from the use of defective materials, the master is not required to supply the best materials known, or to subject such as he does supply to an analysis to determine what hazard may be incurred in their use.

MASTER AND SERVANT—DEFECTIVE APPLIANCES.—Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business as conducted by prudent men.

MASTER AND SERVANT—DEFECTIVE APPLIANCES.—A workman cannot recover damages for an injury caused by the explosion of a barrel containing castings, but which had originally contained some explosive material, if it appears that the explosion was caused by another workman striking a match, that the master had no knowledge that such barrel was explosive, or that it was, in

any way, unsuitable to the use to which it was then put, and that it was the kind of barrel commonly and ordinarily used for such purpose.

R. P. Marshall and T. M. Marshall, for the appellant.

G. B. Gordon, J. Dalzell, and W. Scott, for the appellee.

259 McCOLLUM, J. The plaintiff instituted this suit for the purpose of obtaining compensation for an injury which he alleged he received through the negligence of the defendant company. On the trial of the case the court, adjudging the testimony introduced to establish his claim insufficient, entered a judgment of compulsory nonsuit. The plaintiff then moved the court in Bank to take it off, which motion upon hearing was denied. This appeal was the result of the denial.

The plaintiff testified that he was a common laborer employed by the defendant company to work in its storeroom. The principal part of the work in which he was engaged was the receiving and arranging of its goods in accordance with instructions. On the day he received the injury of which he complains he, with a fellow-workman, was employed in receiving castings brought in barrels from Newark to East Pittsburg. The barrels were obtained by the defendant's purchasing agent from Walsh, "who was a dealer in second-hand barrels. They had originally contained oil, alcohol, turpentine, benzine, whisky, and other things." The purpose of the purchasing agent was to obtain any kind of strong barrel that would hold from five hundred to seven hundred pounds of castings. About one hundred barrels of this description were purchased by the agent and used in the removal of the castings as above stated.

260 The injury received by the plaintiff was caused by an explosion of a barrel he and Dugan were inspecting for the purpose of discovering the number upon it. According to the plaintiff's own testimony the barrel was in a place "that was nearly all the time dark." To the question, "Did some person strike a match?" his answer was, "I couldn't say that he did." Duffy, however, testified that he saw Purdy and Dugan with their heads together down against the barrel, in a stooping position; that he saw Dugan take a match in his hand and light it, and that the lighting of the match was immediately followed by the explosion. This testimony is uncontradicted, and no one questions the accuracy of it. There is no testimony in the case which shows that the defendant company or any other person connected with it knew that the barrels used as above stated were under any circumstances explosive; nor is there any testimony

showing that such barrels are not commonly and ordinarily used for such purposes at manufactories, or that they are in any way unsuitable for such use. It seems, therefore, that the testimony introduced in support of the plaintiff's claim was justly held by the court below to be insufficient to charge the defendant company with negligence.

To be relieved from liability for injuries received by a servant from the use of defective materials, the master is not required to supply the best materials known, or to subject such as he does supply to an analysis to determine what hazard may be incurred in their use: *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519, 4 Am. St. Rep. 613, 12 Atl. 273; *Augerstein v. Jones*, 139 Pa. St. 183, 23 Am. St. Rep. 174, 21 Atl. 24; *Melchert v. Smith Brewing Co.*, 140 Pa. St. 448, 21 Atl. 575; *Dooner v. Delaware etc. Canal Co.*, 171 Pa. St. 581, 33 Atl. 415. From the opinion of our brother Mitchell in *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 626, 20 Am. St. Rep. 944, 20 Atl. 518, we quote the following as relevant to the case at bar: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted ²⁶¹ to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed."

Many cases analogous to those already cited might be referred to or included herein, but it is not thought to be necessary or of material importance to note the numerous decisions in accord with the case to which reference has been made above.

We have examined and considered all the cases referred to in the plaintiff's printed argument, and are not convinced that they rule the case in hand.

Judgment affirmed.

A MASTER OWES TO HIS SERVANT THE DUTY of providing and keeping in proper repair reasonably safe tools, appliances, and machinery: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 592. However, he is bound to use only ordinary care in this matter: *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473, 27 Am. St. Rep. 897,

18 S. W. 571; he is not an insurer of his servant's safety: *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225; and he is not bound to use the safest machinery: *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397, 1 Am. St. Rep. 321, 10 Atl. 49; *Kent v. Yazoo etc. R. R. Co.*, 77 Miss. 494, 78 Am. St. Rep. 534, 27 South. 620. An employer is bound to furnish machinery and appliances of ordinary character and reasonable safety, and the former is the conclusive test of the latter: *Kehler v. Schwenk*, 144 Pa. St. 348, 27 Am. St. Rep. 633, 22 Atl. 910.

HANI v. GERMANIA LIFE INSURANCE COMPANY.

[197 Pa. St. 276, 47 Atl. 200.]

A PAROL GIFT OF A LIFE INSURANCE POLICY may be made by a physical delivery of the policy to the donee, without a written assignment thereof.

S. B. Griffith and E. G. Hartje, for the appellant.

J. M. Swearingen and R. T. McElroy, for the appellee.

278 McCOLLUM, J. The appellant claims that the court below erred in its third finding of fact and in its conclusion of law, but the principal question presented on the appeal is whether the testimony is sufficient to sustain the alleged gift to the plaintiff of an insurance policy of three thousand dollars. The mother of the plaintiff, who was her only daughter, was the owner of the policy, and some months before her death made a parol gift of it to her. The gift was supported by the testimony of two witnesses whose competency and truthfulness were not successfully assailed. The donor, after her delivery of the policy, declared that she had given it to her daughter, and her declaration was sustained by another witness. Besides, she had previously declared her intention to make the gift. The testimony supporting the gift and the testimony in contradiction of it, together with all the circumstances connected with and surrounding the case, were carefully considered by the learned court below, and held to be in accordance with the donee's contention. Our own conclusion, founded **279** upon a due consideration of all the testimony, is in harmony with the conclusion arrived at by the learned court below. Further comment on this branch of the case is unnecessary.

It seems formerly to have been the doctrine that the gift of a chose in action, unless by some document payable to bearer,

required an assignment or some equivalent transfer, and that the transfer must be actually executed. It is now held with substantial unanimity that a written assignment is not necessary in such cases, and that a delivery of a chose in action under such circumstances as would constitute a gift of property in possession amounts to an equitable assignment of the property represented, which the courts will recognize and uphold. Thus the delivery of a bond, certificate of stock, or note to the donee, with the intention of transferring to him the right of property, is sufficient to constitute a gift: 8 Am. & Eng. Ency. of Law, 1322. A delivered to his niece living with him a certificate for ten shares of the stock of an insurance company standing in his own name, stating that he made her a present of it. Afterward the company issued forty shares additional stock representing surplus earnings. These he delivered to his niece, saying they were hers. The dividends were drawn by A till his death, but whether he paid them over to the niece or whether she knew anything about them did not appear. Held, that the delivery of the certificates with an intention to pass the title amounted to an equitable assignment of the shares which a court of equity would uphold: *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663.

Some of our own cases which are relevant to and sustain the conclusion arrived at by the learned court below may be properly referred to herein: *Madeira's Appeal*, 17 Week. Not. Cas. 202, 4 Atl. 908; *Malone's Appeal*, 38 Leg. Int. 303; *Commonwealth v. Crompton*, 137 Pa. St. 138, 20 Atl. 417, and cases cited therein; *Pryor v. Morgan*, 170 Pa. St. 568, 33 Atl. 98; *Wise's Appeal*, 182 Pa. St. 168, 37 Atl. 936. These cases constitute a sufficient answer to any intimation from the defendant of error in the conclusion assailed by the second assignment.

Judgment affirmed.

A PAROL TRANSFER OF A LIFE INSURANCE policy by a husband to his wife is valid: *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116. For an imperfect gift of an insurance policy, see *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338.

BLAKELY v. SOUSA.

[197 Pa. St. 305, 47 Atl. 286.]

CONTRACTS—EXTINCTION OF SUBJECT MATTER.—All contracts must be construed with reference to their subject matter, and a contract defining an existing relation can have no operation when that relation ceases, for its foundation is gone.

CONTRACTS FOR PERSONAL SERVICES—DEATH.—If a contract is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or, more generally, if distinctly personal considerations are at the foundation of the contract, the relations of the parties are dissolved by the death of him whose personal qualities constitute the particular inducement to the contract. The rule is here applied to a contract between a bandmaster and a manager of musical organizations.

CONTRACTS FOR PERSONAL SERVICES—DEATH OF PARTY.—The duty of the survivor to a contract of a strictly personal nature, requiring peculiar skill in its performance, to perform his covenants terminates with the death of the other party to it. The personal representative of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed and discharged by another.

TRADEMARKS—TRADE NAMES.—The name of an artist, author, musician, or lawyer is not regarded as a trade name, and, as such, salable or assignable.

TRADE NAMES—BANDMASTER.—The representative of a deceased musical manager under whom a celebrated bandmaster was engaged during his lifetime has no right to the use of such bandmaster's name after the death of such manager.

J. M. Beck, J. G. Johnson, and W. C. Low, for the appellant.

J. G. Gordon, W. A. Redding, and V. M. Davis, for the appellee.

328 BROWN, J. Neither the complainant nor the respondent is satisfied with the decree made in the court below. Each has appealed from it, the former complaining that it gives her too little, and the latter asserting that she gets too much. The appeal of the complainant, though taken later than that of the respondent, will be first considered, as it raises the most important questions to be disposed of.

The contract out of which this controversy arose was in writing, having been executed by the parties to it on June 27, 1892, and the obligations assumed by each were to extend through a period of five years from August 1, 1892. Before the expiration of this period, David Blakely, one of the contracting parties, died, and the first and most important question is as to the effect of his death upon the agreement. His personal repre-

sentative insists that the contract was unaffected by his death; that, as his substitute in it, she has succeeded to all his rights ³²⁹ under it, and can compel full performance by Sousa, the survivor. The latter, however, contends that personal services to be rendered by the deceased, who possessed peculiar ability and qualifications, were the inducements that led him to enter into the contract, and that the relations established by it were dissolved by the death of him whose personal qualities had so induced him. The effect of the death of a party to a contract whose distinctly personal services, involving peculiar skill and experience, are at the foundation of it, in the absence of any provision that the survivor must accept performance by the personal representative of the deceased, is not in doubt. This is settled by reason, and authorities are not wanting in support of it. "All contracts must be construed with reference to their subject matter, and a contract defining an existing relation can have no operation when that relation ceases, for its foundation is gone": *Bland v. Umstead*, 23 Pa. St. 316. "The general doctrine on this point was very thoroughly examined and discussed by my brother Lowrie, J., in *Dickinson v. Calahan*, 19 Pa. St. 227. The conclusion arrived at there seems to be, that if the contract of a decedent be personal, and the performance of the deceased himself be the essence thereof, his executors will not be liable, excepting only so far as the contract was broken during his lifetime; and the instance is given of a contract to impart artistic or mechanical skill and information. Such a contract could not devolve on the representatives of the deceased, for, as it was there said, 'we cannot suppose that the deceased was contracting for any kind of skill in his administrators': *White v. Commonwealth*, 39 Pa. St. 175. "Where the agreement is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or, more generally, where distinctly personal considerations are at the foundation of the contract the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract": *Billings' Appeal*, 106 Pa. St. 558. "A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death or a disability which renders performance impossible discharges the contract": ³³⁰ *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 38 N. E. 1117. The duty of the survivor to a contract of a strictly

personal nature to perform his covenants terminates with the death of the other party to it, for the reason that neither of the contracting parties contemplated attempted performance by a substitute. Where distinctly personal services, requiring peculiar skill, are to be rendered by each of the contracting parties as inducements to the contract, there is mutuality, and the death of either of the parties is the death of the contract. In such a case the personal representative of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed and discharged by another.

Turning to the contract before us, what was its nature and what effect did the death of Blakely have upon it? On its face it sets forth a combination of the business ability of Blakely with the musical talent of Sousa for mutual profit. In its very first lines the purpose of the agreement appears to be the formation of a musical organization of high excellence, the manager of the same to be David Blakely, who had been "the manager of the late tours of the United States Marine Band," and the musical director, John Philip Sousa. Each of the parties to the contract understood the personal qualities of the other and manifestly regarded them as the inducements to it. Without the business qualities, ability, and experience of Blakely, or the musical skill of Sousa, the organization, to be known under the contract as "Sousa's Band," would not have been formed. We find this where we ought to find it—within the contract itself. We there find that David Blakely, styling himself "the manager of the late tours of the United States Marine Band," was "desirous of perfecting a new organization, for the purpose of securing high excellence in a military band, and, with that view, to secure the services of John Philip Sousa as its musical director," who was willing, "on the terms set forth in the contract," to accept the position. The ninth clause of the agreement provides: "The musical direction of the aforesaid organization shall be in the hands of the said John Philip Sousa, and the business management in the hands of said Blakely, as aforesaid, but both shall mutually receive counsel in their respective positions, and especially regarding the preparation of programs." The fifteenth clause is as follows: "It is agreed that both parties ³³¹ to this agreement shall do all that within them lies to make the enterprise herein contemplated a success, both musically and financially; and, in general, they shall both spare no pains to forward the interests of the business connected directly or indirectly therewith." Nowhere does it appear that

either of the contracting parties contemplated the services of anyone else. They, and they alone, by the combination of their own personal qualifications were to strive for the success of the enterprise. Having understood that each relied upon the peculiar qualities of the other, neither bound his executors or administrators, for the death of either would make it impossible for the contract to survive, and, in such case, "non tenetur promissor." Blakely's business qualities and ability as the manager of the band would pass away with him, and Sousa's great skill would not be found in his executor or administrator. The compensation to be paid to Sousa included a proportion of the annual net profits of the enterprise. He was not to receive a fixed compensation at all times, but one which depended upon the success of the enterprise. He agreed to such compensation, feeling that the intelligent business direction of Blakely would make it sufficient; but in no place in his agreement is there any provision on his part that he would trust his profits to the business management of another. This alone ought to be conclusive of his right to insist that no one can be substituted as manager for Blakely. It is true that an assignment of the contract was contemplated by the parties, but only under certain conditions. The words "executors or administrators" cannot be found in it, or any other words indicating an intention that, upon Blakely's death, his personal representative should take his place. The learned referee did find as a fact that before and at the time of the execution of the contract Blakely and Sousa contemplated the formation of a corporation to be known as "The Blakely Syndicate." It was to be perfected by Blakely, and a clause provided that, if the corporation should not be formed, the contract should be and remain in full force as to both parties to it. This corporation, if formed, was to succeed, by assignment of the contract, to the rights under it, but no other was to be an assignee. If the contract was to be generally assignable, what necessity was there for this express provision that it might be assigned to the company to be formed 332 by Blakely? The answer must be that the assignability was clearly limited to the corporation to be so formed, and extended to no one else. "Expressio unius, exclusio alterius."

Going outside of the contract, the learned referee properly found that the personal qualities of each of the parties constituted a potential inducement to the making of it. In her bill of complaint, asking for relief, the peculiar skill, business ability, and experience of Blakely, and the character of services

which he performed under the contract, are all set forth, and he must have understood, when he lived, as his personal representative manifestly does now, that these qualities were the inducement leading Sousa into the compact. The referee was, therefore, clearly right in holding that the relations which had existed between Blakely and Sousa under the contract of June 27, 1892, and extended by the agreement of September 10, 1896, were terminated by the former's death on November 7, 1896, and the first four assignments of error are overruled.

We come now to a consideration of the right of Blakely's estate to use Sousa's name in connection with musical organizations. It is contended by the complainant that the said name became the property of Blakely, and, upon his death, passed to his estate. Apart from the absence of any words showing that any part of the contract was assignable, except under the limitation already referred to, the assignment of the name "Sousa" cannot be enforced, for the reason that its enforcement would be against public policy, and enable the assignee to impose upon and deceive the public by inducing them to attend concerts under the impression that they were to be given by Sousa, when, in fact, he would have nothing whatever to do with them. It is true that the right of a person to use the name of another in connection with a business or a manufactured article passes under an assignment and sale of goodwill of the business, which includes the right to the trade name. It has often been held that a trademark or a trade name, representing an article of commerce or a local business, is property which may be disposed of; but the name of an artist, an author, a musician, or a lawyer has never been regarded as a trade name, and, as such, salable. The value of the names of such persons depends entirely upon their personal reputation, skill, and experience, and is indissolubly connected or associated with the owner. "There may, no
333 doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trademark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such case it would be a fraud upon the public if the trademark should be used by other persons, and for this reason such trademark would be held to be unassignable. It is, in any case, a question whether the use of the trademark would give to the public or to purchasers a false idea as to who made the article; and a court of equity would not lend any active aid to sustain claim to a trademark which would contain a misrepresentation

to the public": *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713.

In *Messer v. The Fadettes*, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407, the leader of an orchestra attempted to sell all her right, title, and interest in and to a musical organization or orchestra, together with the name by which it was designated, "The Fadette Ladies' Orchestra," and it was held that the name was unassignable, that the use of it by the assignee would mislead and defraud the public, and for that reason the claim to have the assignment enforced would not be sanctioned by the courts. In *Skinner v. Oakes*, 10 Mo. App. 45, it was held: "If an author were to assign to another the privilege of publishing books with his name on their title page, or if a painter were to sell to another the privilege of placing the former's signature upon pictures painted by the latter, it cannot for a moment be supposed that any court would protect such supposed right, even as against the original assignor. This point is absolutely clear, both upon principle and authority." In *Hegeman v. Hegeman*, 8 Daly, 1, it was held: "When, however, the whole pecuniary value of a name is derived solely from the personal qualities of the one to whom the name belongs, such as his skill, special knowledge, and experience, or from the fact that the article is produced under his personal supervision, which imparts to it a special value, then the right to the name is not transmissible." It is useless to multiply authorities. The name "Sousa" in connection with the band implies his skill, science, and art. Even as against him, the assignor of his name to another, the assignment cannot be enforced in a court of equity. To do so would be to lend ourselves to fraud and imposition upon the public, when it is our duty in every instance to protect ³³⁴ them. The seventh and eighth assignments of error are also overruled.

The fifth assignment challenges the correctness of a finding of fact by the referee. We cannot and ought not to disturb the finding, and the assignment falls. We cannot sustain the sixth, because the referee's conclusion, approved by the court below, that Mrs. Blakely was entitled to only one-half of the net profits of the band's performances, running to May 23, 1897, inclusive, was based upon his finding that, after the death of Blakely, the appellant and the appellee had entered into an oral contract, by the terms of which the former "was to employ all members of the band and officers, pay all salaries, receive all receipts, pay expenses, and account for and pay to defendant (Sousa)

compensation in accordance with the terms of the contract between him and Mr. Blakely as it existed at the time of Blakely's death." At that time the profits were equally divided, in accordance with the modification of the contract made by Blakely himself, and as the liability of the appellee to account for the performances held up to and including May 23, 1897, depends upon his oral agreement with Mrs. Blakely, the measure of it must be there found. It was one-half of the profits, and the referee properly recommended a decree that the appellee so account.

If, as we have held, sustaining the referee and the court below, the contract between Blakely and Sousa terminated at the former's death, the latter's liability to do or perform anything ended at the same time. Whatever Sousa may have done after Blakely's death he did for himself. The term of his employment ended with the death of his employer, and thereafter the fruits of his genius and skill, no longer directed by another, were his own. The music which he composed when his time was again his own belonged to him, and no error was committed in restricting his liability for royalties to the music which had been composed in the lifetime of his employer. The ninth assignment, therefore, and the tenth, which raises all the important questions just disposed of, are overruled, and the decree of the court below, made in accordance with the referee's exceptionally well-considered report, is affirmed, and the appeal dismissed at the costs of the appellant.

Mitchell, J., dissents.

IN THE SUBSEQUENT CASE of *Blakely v. Sousa*, 197 Pa. St. 335, 47 Atl. 289, arising out of the same facts as those in the principal case, it was decided that if a contract between a musical manager and a bandmaster provides that music composed during the time of the latter's employment shall belong jointly to the parties, royalties on music composed during such time and accruing after the death of such manager belong jointly to such bandmaster and the personal representatives of the deceased manager.

A CONTRACT TO PERFORM PERSONAL SERVICES requiring skill and ability of a high order is subject to the implied condition that the party shall be alive and well enough in health to perform it: *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, 38 N. E. 1117; *Yerrington v. Greene*, 7 R. I. 539, 84 Am. Dec. 578; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7. Contracts of a personal nature are determined by the death of the contractor: *Notes to Chamberlain v. Dunlop*, 22 Am. St. Rep. 812; *Hawkins v. Ball*, 68 Am. Dec. 760.

MILNES v. VAN GILDER.

[197 Pa. St. 347, 47 Atl. 197.]

ADVERSE POSSESSION AS BETWEEN GRANTOR AND GRANTEE.—Refusal by a grantor by warranty deed in possession of the premises to surrender them to the grantee is notice to the latter to proceed to the vindication of his rights, and if he delays doing so beyond the period of twenty-one years, his deed cannot prevail against his grantor's adverse possession. The grantor need only defy his grantee's right to possession by distinctly refusing it when demanded, and if he is not disturbed for the period of statutory limitation, he is protected in his title, if he can establish the kind of adverse possession required by the law in the interval.

ADVERSE POSSESSION BY GRANTOR AS AGAINST GRANTEE.—A grantor with warranty may originate a possession adverse to his grantee, and such possession differs from that originated by a stranger only in requiring stronger proof to sustain it.

H. T. Ames and J. M. Gannan, for the appellant.

J. T. Fredericks, for the appellee.

349 BROWN, J. The facts in this case can be very briefly stated. Mary A. Van Gilder, the owner in her own right of the premises in dispute, as devisee of her father, Allan Harvey, conveyed the same, by a deed of general warranty, on July 30, 1870, to William Milnes, the ancestor of the appellees, but did not deliver possession to him. On September 9, 1871, Milnes conveyed them to John R. Hazelet, who, on October 4, 1871, served written notice on Mary A. Van Gilder and Samuel G. Van Gilder, her husband, that he had purchased the property and demanded possession, which was refused. After so serving notice on the Van Gilders and their refusal upon demand, so made, to surrender possession of the premises to him, Hazelet, in a conversation with Milnes, was told by the latter that he could not deliver possession. Milnes, having been so unable to deliver possession to Hazelet, paid him one hundred and fifty dollars or two hundred dollars and took a reconveyance of the land by deed dated January 16, 1872. From October 4, 1871, the date of the demand by Hazelet upon the Van Gilders for the surrender of the premises to him, and their refusal, they remained in open and exclusive possession, paying the taxes regularly, and almost twenty-six years had elapsed from the time demand was so made until this suit was brought, on July 7, 1897. With these facts before it, the court below directed a verdict in favor of the plaintiffs, and the four assignments

of error raise the question of the propriety of the instruction so given to the jury.

In directing a verdict for the plaintiffs, the learned trial judge gave no reason for doing so, and we can only conjecture from the case as presented to us by counsel that he must have felt either that the statute of limitations, relied upon by the defendants, could not be invoked by them, because they were the vendors in a deed of general warranty to their vendee, through whom the plaintiffs claimed title, or that, even if the statute extends to such a case, the evidence of adverse possession ³⁵⁰ submitted by the defendants was insufficient to defeat the plaintiff's title. The statute makes no exception of a vendor in a deed of warranty holding against his vendee, and though in such a case the presumption is that the vendor holds in subserviency to the title of the vendee, there is no reason why the wise provisions of the act should not apply when that presumption is overcome by clear and convincing proof of a holding hostile to and defiant of the vendee's title. There have been instances within the experience of many, if not all, of us of the execution and delivery of deeds to vendees, not only not followed by delivery of possession of the premises sold, but by refusal of the same, due to alleged fraud or imposition by the vendees upon the vendors. In all of such cases failure of the vendee to assert his title by ejectment for the possession of the property purchased seems to be his admission that he cannot. Refusal by a vendor in possession of premises to surrender them to a vendee demanding delivery is notice to the latter to proceed to the vindication of his rights, and if he delay doing so beyond the period of twenty-one years, it is his own fault that his deed will not prevail against his vendor's adverse possession. A vendor refusing possession to his vendee has, or imagines he has, good cause for his refusal, and is not required to become the actor in any proceeding for the annulment of his deed. He need only defy his vendee's right to possession by distinctly refusing it when demanded, and if then he is not disturbed for twenty-one years, at the expiration of that period the statute protects him, no less than a stranger to the title, if he can establish the kind of possession required by the law in the interval. This ought to be so, and a dilatory vendee ought not to complain of it. By his delay proof of what was the reason for his vendor's refusal to deliver possession may become impossible. Witnesses may disappear, papers may be lost, or, as in the cases before us, the death of a vendee in a suit by his

heirs may seal the vendor's lips, which might be able to tell why possession was refused long before when demanded. "This statute is a most important and beneficial one. It was made to protect those who had no other protection, for cases where all evidence is lost. I have attended to its operation almost half a century, and I do not know any more beneficial, and in its general operation more just, law. It gives as perfect a title, if ³⁵¹ not a more perfect title, than any other known to our law, and, as a general rule, the cases in which it has been attempted to be avoided after the clear lapses of twenty-one years have been reached by combination of those interested, though not known to be so, by rash swearing, and sometimes direct perjury": *Huston, J., in Leeds v. Bender*, 6 Watts & S. 315. We have never held that the statute of limitations does not apply to such a case, but, on the other hand, have recognized its application: *Connor v. Bell*, 152 Pa. St. 444, 25 Atl. 802. In *Sherman v. Kane*, 86 N. Y. 57, it was held upon the authority of *Zeller v. Eckert*, 4 How. 289: "The doctrine that a grantor with warranty may originate a possession adverse to his grantee, and that the adverse possession originated by a party in privity with the true owner differs from that originated by a stranger only in requiring stronger proof, is well established."

Stronger proof being required when adverse possession against a grantee is relied upon by a grantor with a warranty than from a stranger, was the evidence of appellants sufficient to justify a finding in their favor? Their possession of the premises, according to the testimony, had been for more than twenty-one years before the institution of this suit actual, continued, visible, notorious, and distinct, and, judged by what we have said, adverse and hostile to the title of the appellees. The possession was in conflict with the deed to the ancestor of the appellees, and hostility was asserted almost from the inception of the title claimed under it. If the possession was such, the plaintiffs had no right to oust the defendants. How is it to be determined whether the possession was adverse and hostile? The answer can be found in the words of our brother McCollum, in *Connor v. Bell*, 152 Pa. St. 444, 25 Atl. 802, and the authorities there referred to. "Was such continued possession of a portion of the lot conveyed by him sufficient, in the absence of any word or act indicative of a hostile claim, to defeat the title of his grantee? This question is not a new one, and the negative answer returned to it by the learned court below is supported by our own decisions and the current of authority in

this country. In volume 1, page 247, note 4, of the American and English Encyclopedia of Law, it is said that 'the mere possession of the vendor of lands is not adverse to his vendee.' In *Buckholder v. Sigler*, 7 Watts & S. 154, as in ³⁵² this case, the vendee occupied a portion of the land conveyed to him, and his vendor continued in the possession and use of a part of it as before the sale. It was held that the possession of the vendor was in subservience to the title of his vendee. In *Olwine v. Holman*, 23 Pa. St. 279, it was said that 'a vendor after conveyance and before delivery of possession is to be regarded as a trustee for the vendee so far as regards the possession, just as he was a trustee of the title before conveyance. If he wishes to change the character of the possession he must manifest his intention by some act of hostility to the title of his vendee, plainly indicating to the latter the intention to deny his right and to hold adversely to it.' This principle is sound and not denied by any decision of this court." Could there have been any word or act of the appellants more plainly indicative of their "hostile claim" than their positive refusal to deliver possession of the premises when demanded by Milnes or his vendee? Was not their defiance of the title of Milnes a manifestation of their hostility to it, indicating their intention to deny his right to the property and to hold adversely to his deed? There can be but one answer to this. By unmistakable conduct on their part, Milnes knew that his title was defied by his vendors, and that they would remain in possession in hostility to it. Certainly, they were not required to make known this hostility by any breach of the peace or unseemly conduct. They could, by firmly and unequivocally refusing to allow him or his vendee to take possession of the premises, as effectually notify him that his title was defied and they would remain in the property in hostility to it as if, with a club or shotgun, they had kept him off. Notice to Milnes was essential. If they intended to hold adversely and in defiance of the deed they had given to him, he was entitled to distinct notice that they so held in view of the privity between them, and if Hazelet is to be believed, he received it. According to the testimony of that witness, they did all that was required to indicate their hostile claim and adverse holding, and the jury should have been instructed that if, from the testimony, they found for more than the statutory period the defendants had been in actual, continued, visible, and distinct possession of the premises, there was sufficient evidence, if believed, that such

possession was also adverse and hostile, in the face of which ³⁵³ the plaintiffs could not recover. That under proper instructions the case may be submitted to a jury, the judgment is reversed and a venire facias de novo awarded.

Dean, J., dissents.

ADVERSE POSSESSION.—POSSESSION BY A VENDOR of land after execution and delivery of a deed therefor is in trust for the vendee, and the statute of limitations does not begin to run until the vendor asserts an adverse holding by some unequivocal act brought to the knowledge of the vendee: *Kern v. Howell*, 180 Pa. St. 315, 57 Am. St. Rep. 641, 36 Atl. 872. For instances of adverse holding by a grantor against his grantee, see *Watson v. Gregg*, 10 Watts, 289, 36 Am. Dec. 176; *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772.

ACME MANUFACTURING COMPANY v. REED.

[197 Pa. St. 359, 47 Atl. 205.]

GUARANTY—NOTICE OF ACCEPTANCE.—A guarantor of a future credit or advance is entitled to notice from the party giving the credit of his acceptance of the guaranty, unless the agreement to accept is contemporaneous with it. Without such notice there is no contract.

GUARANTY—NOTICE OF ACCEPTANCE.—A guarantor of the payment of an order for goods is not liable to the guaranteee without notice of his acceptance of the order, although the latter contains a stipulation that it shall be considered as accepted unless notice to the contrary is given within a specified time. In such case acceptance of the order by silence is not notice to the guarantor of the acceptance of the guaranty.

EVIDENCE.—DEPOSITIONS which are to be read by agreement in one case cannot, in the absence of agreement to that effect, be read in a subsequent action between the same parties commenced after a nonsuit is suffered in the first action.

J. R. Thompson, for the appellant.

T. A. Lamb, for the appellee.

³⁶² **BROWN, J.** The appellant brought suit on an alleged guaranty to it by the appellee, and a verdict was directed in the latter's favor, because no notice had been given him by the former of its acceptance of the same. It seems that in December, 1895, Leo Schlaudecker had given the appellant an order for a lot of bicycles, which it did not fill. Subsequently, a representative of the company saw him and requested security for the order

sent in. On February 24, 1896, he sent another order to the appellant for the bicycles that had been ordered in December, and in giving it used the regular form of contract adopted by the company. It was as follows, a portion of the first sentence having been written:

“Erie, Pa., 2-24, 1896.

“Acme Manufacturing Co., Reading, Pa.

“Gentlemen: I herewith hand you my order, through your representative for quantity and specifications already sent in Stormer bicycles, this order not being subject to countermand:

“Discount Terms: F. O. B. Reading, Pa. days.

“Deliveries to be made as follows:

“December..... April.....

“January..... May.....

“February..... June.....

“March..... July.....

“This order is given with the understanding that have the exclusive sale of Stormer bicycles in the following territory, viz.:..... so long as give your bicycles proper and fair representation.

“This order is taken subject to the approval of the Acme Manufacturing Co. If notice to the contrary is not given within thirty days after receipt of the order at their office in Reading, Pa., it will be understood that the order is accepted.

“Remarks.....

(Signed) “LEO SCHLAUDECKER.

.....
“For ACME MANUFACTURING CO.”

363 Though the order purports to have been taken by the Acme Manufacturing Company, it was simply sent to the company by Schlaudecker.

The company had not signed the paper. It is not, on its face, a contract between the parties, but simply an order from Schlaudecker, who had used the company's regular form of contract, in which it appeared that the order would be considered accepted, unless notice to the contrary was given by the company within thirty days from its receipt at the office in Reading. On the back of the order there is the following, which is the subject of this suit:

"GUARANTY.

"In consideration of \$1.00 paid me by Acme Manufacturing Co., the receipt of which is hereby acknowledged..... of the city of Erie, county of Erie, state of Pennsylvania, do hereby guarantee to the said Acme Manufacturing Co. the prompt fulfillment of all the covenants and conditions of the within contract on the part of Leo Schlaudecker, and that the within named Leo Schlaudecker will make the payments therein specified according to the terms thereof.

"Witness my hand and seal this day of
A. D. 189 .

"Witness

"CHAS. M. REED. [Seal]"

This order, with the indorsement, reached the company's office some time in April, 1896, and, without any notice to Reed, bicycles were shipped to Schlaudecker from time to time in pursuance of it. He did not pay for them, and after trying to collect from him, the company resorted to Reed on the foregoing guaranty.

If this guaranty was absolute and accepted when given for the payment of indebtedness about to be created by Schlaudecker, notice of its acceptance by the appellant was not necessary to fix the liability of the guarantor: *Gardner v. Lloyd*, 110 Pa. St. 278, 2 Atl. 562. On the other hand, as was said by the late Chief Justice Green, in that case, after citing numerous authorities and well-considered cases: "In all of them the doctrine is in force that where the event is future and depends upon the will of the guarantee, he must give notice of acceptance to the ³⁶⁴ guarantor before the latter becomes subject to any liability. . . . There is no principle of the law of contracts more firmly settled than that a guarantor of future credit or advancing is entitled to notice from the party giving the credit, of his acceptance of the guaranty, unless, indeed, the agreement to accept be contemporaneous with it: *Wildes v. Savage*, 1 Story, 26, Fed. Cas. No. 17,653. And even this is rather an instance of simultaneous proffer and notice of acceptance, than an exception to the rule. Without such notice there is no contract, for a party giving a letter of guaranty has a right to know whether the person to whom it is addressed means to hold him ultimately responsible, inasmuch as his own caution and vigilance may, in a great measure, be regulated by his knowledge of the fact. The authorities to this point are numerous and concurrent. Many of them

are brought together by Mr. Justice Story, in his treatise on Contracts. In one of them (*Edmonston v. Drake*, 5 Pet. 624) the supreme court of the United States, speaking of this species of suretyship, says: 'It would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it': *Kay v. Allen*, 9 Pa. St. 320. It was urged in that case that a precedent request by the creditor to the party subsequently offering the guaranty was equivalent to notice of acceptance, but Bell, J., says: "I find no warrant for this view in any of the cases with which I am acquainted Indeed, it is difficult to imagine how precedent request alone can supply the place of subsequent notice, since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved, and, without notice, the surety cannot know whether he has or not."

In *Adams v. Jones*, 12 Pet. 207, Story, J., said the question before the court was: "Whether upon a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given to the party, in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it." 365 His answer was: "We are all of opinion that it is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russell v. Clark*, 7 Cranch, 69," and other cases. What we said in *Coe v. Buehler*, 110 Pa. St. 366, 5 Atl. 20, is most appropriate to the case now before us. "The absence of notice of acceptance by the plaintiffs to the defendant is fatal to their claim. When the defendant signed the guaranty it was his proposition only. The contract which he proposed to guarantee had not been executed or accepted by the plaintiffs. True, they did execute it soon afterward, yet they gave no notice thereof to the defendant." This rule that a guarantor must have notice of the acceptance of his guaranty by the guarantee "is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other

parties to discharge him from future responsibility": *Adams v. Jones*, 12 Pet. 207.

It is insisted that as the guaranty of Reed was absolute and complete, he was not entitled to notice of its acceptance, and, still further, that he was not entitled to notice, because by the terms of the order there is a stipulation that the same would be considered accepted by the appellant unless it gave notice to the contrary within thirty days of its receipt at the office in the city of Reading. The guaranty was that if the appellant would accept Schlaudecker's order, the performance by him of his part of the contract would be guaranteed. When it was given, no contract existed between Schlaudecker and the company. He had simply sent in his order with the guaranty on it, to be filled if accepted. The company was not bound to accept it, and when it was received with the accompanying guaranty, there was no agreement to accept it, but by its very terms it was open to rejection for thirty days, and until its acceptance no contract existed between the parties. It was clearly the case of a contract to be entered into by the guarantee in the future, depending upon its will. Upon the making of the contract and notice of the acceptance of the guaranty by the company for the fulfillment by Schlaudecker, and not before, the guarantor would incur liability. In this respect, 366 *Davis v. Wells, Fargo & Co.*, 104 U. S. 159, earnestly pressed upon our attention as controlling the present case, is clearly distinguishable. The guaranty there was, as held by Mr. Justice Matthews, "a complete and perfect obligation," carrying, "upon its face, conclusive evidence that it had been accepted by Wells, Fargo & Co." Reed's guaranty was delivered by him to Schlaudecker, who sent it to the appellant, to be accepted or rejected, as the order upon which it was indorsed was accepted or rejected. No notice was ever given to Reed by the company that the order had been accepted or that his guaranty had been received and retained by it.

But, as we have stated, it is urged that the guarantor was not entitled to notice of the company's acceptance of his guaranty, because the order provides that it should be understood as accepted if notice to the contrary was not given within thirty days from its receipt. This is confounding the contract of Schlaudecker with that of Reed. The latter's is a separate and independent undertaking, and contains nothing as a waiver of the notice, which, under the uniform decisions, the guarantee was to give him if it intended to hold him. Even if the order

of Schlaudecker is to be regarded as a contract with the company, he was to be in suspense for thirty days, and at the expiration of that period failure to notify him of its acceptance was to be understood by him as meaning acceptance. But how was Reed to know that the company had been silent? By the terms of the order Schlaudecker was to know in time whether it was accepted and contractual relations established between him and the company, but there was nothing in it providing that his guarantor should know even that. The silence of the company was to be notice to Schlaudecker of its acceptance of the order; but how was Reed to know that it had been silent? Though by the terms of the order it could be silent to Schlaudecker, and by its silence contract with him, it could not be silent to Reed. It might say to Schlaudecker that by its silence it would contract with him; but it could not by silence contract with Reed, in the absence of his agreement that it should do so. Its duty was to speak to him and tell him that it looked to his guaranty for the fulfillment of Schlaudecker's promises.

What we have said disposes of all the assignments of error **367** except the first, and it cannot be sustained, because the depositions offered could not have been received under objection. The agreement as to them was in another suit and did not extend to the present one. In the absence of a stipulation that they should be read in this proceeding, they could not be received, and the court, in rejecting them, simply construed the agreement as it was written.

The specifications of error are all overruled and the judgment is affirmed.

GUARANTY—NOTICE OF ACCEPTANCE.—To bind a guarantor, it must appear that he was notified of the acceptance of the guaranty, and of the reliance upon it: *Roberts v. Griswold*, 35 Vt. 496, 34 Am. Dec. 641; *Saint v. Wheeler etc. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210, 10 South. 539. Notice of the acceptance of an offer of guaranty must be given within a reasonable time after such acceptance, if it is of such a kind that knowledge of it will not quickly come to the promisor: *Bishop v. Eaton*, 161 Mass. 496, 42 Am. St. Rep. 437, 37 N. E. 665.

**DERRY COUNCIL v. STATE COUNCIL JUNIOR ORDER
UNITED AMERICAN MECHANICS.**

[197 Pa. St. 413, 47 Atl. 208.]

CORPORATIONS — BENEFICIAL ASSOCIATIONS — CORPORATE ACTS OUTSIDE OF STATE.—A beneficial association incorporated in one state for the promotion of the interests of its members, and to afford them relief in sickness, and having subordinate councils and members throughout the United States, may, at a meeting held outside the state of its incorporation, impose a valid per capita tax on all of its members. Such association is not within the rule that a corporation must perform all of its corporate acts within the state that gives it life.

JUDGMENTS, IF CORRECT, will not be reversed because wrong reasons are given therefor by the trial court.

BENEFICIAL ASSOCIATIONS — OBJECTION TO PER CAPITA TAX.—If the by-laws of a beneficial association direct that the per capita tax on members shall be an amount to be "enacted" yearly, an objection that such tax was not enacted by a statute of the association is of no avail in an action to collect such tax, if the financial committee of the association has recommended the amount of the tax, and the national council has approved such recommendation.

W. U. Hensel, A. D. Wilkin, and A. M. De Haven, for the appellants.

J. E. Fox, W. A. Pike, and M. W. Jacobs, for the appellees.

416 BROWN, J. The injunction in this case was awarded solely on the ground that the action of the National Council of the Junior Order of United American Mechanics of the United States of North America, in levying the per capita tax at Minneapolis in 1899, was null and void. The court below so concluded, because, in its judgment, the levying of the tax was a corporate act by the body, which, having been incorporated in this state under our corporation act, had no power to do a corporate thing—that is, something relating to or concerning its existence—beyond the limits of the commonwealth that had created it. It is true, as a general proposition, that a corporation can have no legal existence beyond the bounds of the sovereignty that gave it life, and must dwell within the place of its creation: *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286; *County of Allegheny v. Cleveland etc. R. R. Co.*, 51 Pa. St. 228, 88 Am. Dec. 579; *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119. It is equally true, as a general rule, that as the corporation cannot exist beyond the limits of the sovereignty from which it springs, its strictly corporate acts must be per-

formed within such limits: *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 54 Am. Rep. 760, 20 Atl. 1032; *Green's Brice's Ultra Vires*, 442, note a; *Thompson on Corporations*, sec. 694. What was done by the National Council at Minneapolis in 1899 to provide for the collection and payment of the per capita tax was, as held by the court below, a corporate act of the body. In levying this tax it was providing for revenue upon which its existence may have depended. If it had no right to exist within another sovereignty and perform such corporate acts as are complained of, the decree before us for review ought not to be disturbed; but if it is not such a corporate body as should be subject to the general rule relating to the place of the existence of a corporation and the limits within which all strictly corporate acts must be performed, the court ⁴¹⁷ below erred in awarding the injunction, unless for other good cause it should have issued.

The National Council of the Junior Order of United American Mechanics of the United States of North America was incorporated by the court of common pleas, No. 3, of Philadelphia, on April 10, 1893, under the provisions of the act of April 29, 1874, and its supplements, and is a corporation designated by the statute as "not for profit." Nearly a quarter of a century before its incorporation it had been organized, having been composed of the state councils of Pennsylvania, New Jersey, and Delaware. Now it is composed of councils and members of thirty-two states and territories. The purposes of the order, as an unincorporated society, continued to be the same after its incorporation, and were beneficial and protective, and "to maintain and promote the interests of the Americans, and shield them from the depressing effects of foreign competition; to establish a sick and general fund; to maintain the public school system of the United States and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein; to assist the American youth in obtaining employment, and to encourage them in business; to afford relief to the members and their families in case of sickness, and to defray the expenses of their funerals, or such other cases of distress as shall be defined by the by-laws." It exists as a great family, to help and protect its members. It is of a social and not of a business character. It has no capital stock, and the making of money is not its object. Its aims and membership, as declared by its charter, are national, confined to no state or locality. A majority of its members and councils are nonresi-

dents of Pennsylvania. Must such an order, such an incorporated body, as diffusive as the limits of the nation, exist and act only within the borders of the sovereignty that created it; or should it, a purely beneficial organization, with its broad aims and objects and its brotherhood extending from ocean to ocean, be permitted, from time to time, to act at such places beyond this commonwealth as may be selected for the manifest convenience and welfare of its members? If the reasons of the general rule requiring a corporation to perform its corporate acts within the state or sovereignty that gave it life extend to this order, it was properly enforced by the court below; but ⁴¹⁸ if they do not apply, the rule itself should not. Cessante *ratione legis*, cessat *ipsa lex*. These reasons must be, as in any *ultra vires* act by a corporation: "1. The interest of the public, that the corporation shall not transcend the powers granted; 2. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; 3. The obligation of everyone entering into a contract with the corporation to take notice of the legal limits of its powers": *Pittsburgh etc. Ry. Co. v. Keokuk etc. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. Rep. 770. The reason of the rule "does not lie in the imaginative notion that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty'; but rather in the hardship and fraud it might entail on shareholders to permit corporate meetings to be held outside the state. Accordingly, there seems to be no reason for holding invalid acts done at corporate meetings assembled without the state, if all the shareholders acquiesce in the holding of such meetings": *Taylor on Private Corporations*, pt. 5, p. 281.

In levying the tax it cannot be pretended that this order transcended any corporate power granted, and the public, which cannot fairly be said to have any interest in the powers possessed by this family order, most certainly had none as to where they were exercised. It could make no manner of difference to the public whether the tax was levied in Philadelphia or Minneapolis. The public were not affected. The order did not deal with them, but only with its own members, its own private family. It had no stockholders to be subjected to risk, hardship, or fraud, and it did not undertake to enter into any contract. Its relations with the members of this complaining council had already been established, and presumably existed

for years. The levying of the tax was simply providing a revenue for the continued existence of the organization, of which these complainants were practically component parts. No reason, therefore, exists for the application to the case before us of the rule as to corporate acts beyond the limits of the state creating the body, and the appellants justly ask us to exempt them from it. Any other view would impel us to the conclusion that all religious, literary, patriotic, or beneficial ⁴¹⁹ societies of a national character, scope, or origin, which have been incorporated by the courts, by acts of general assembly, or, since 1874, under the general corporation laws of Pennsylvania, were incapable of holding their meetings, transacting their business, and adopting rules and laws at places outside the state. It is matter of common knowledge that religious denominations and beneficial and charitable orders hold their annual meetings from year to year at different points throughout the Union, from Boston to San Francisco, and from Minneapolis to New Orleans, as the pleasure and convenience of the members or the welfare of the society suggest. To select at random from the pamphlet laws: The General Assembly of the Presbyterian Church in America was incorporated by act of assembly in Pennsylvania in 1799; the Presbyterian Historical Society, in 1857 (Pub. Laws 1858, p. 535), with the object of collecting and preserving the materials, and to promote the knowledge of the history of the Presbyterian Church in the United States of America, and unlimited in the territory from which its membership was drawn; the German Eldership of the Church of God, in 1860 (Pub. Laws, 126); the Board of Foreign Missions of the United Presbyterian Church of North America, in 1866 (Pub. Laws, 861); the Lutheran Mission and Church Extension Society in 1871 (Pub. Laws, 99), composed of citizens of Pennsylvania and adjacent states; the Board of Education of the Presbyterian Church in the United States of America, in 1871 (Pub. Laws, 791); the Church Extension Society of the Methodist Episcopal Church, in 1865 (Pub. Laws 807); the General Eldership of the Church of God in North America, in 1867 (Pub. Laws, 1295); the General Assembly of the Church of Christ in America, in 1866 (Pub. Laws 1867, Appendix, p. 1418); the General Board of Directors for Orphans' Home of the Reformed Church, in 1866 (Pub. Laws 1867, Appendix, p. 1438); the Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church in the United States of America, in 1873 (Pub. Laws, 623); the General Assembly of

the United Presbyterian Church of North America, in 1859 (Pub. Laws, 482). To these might be added, almost indefinitely, a long line of like societies incorporated by the courts of Pennsylvania before and since the act of 1874, extensive as the country in the dispersion of their membership and the exercise of their corporate powers upon their corporate objects. ⁴²⁰ They have, without question by anyone, changed their places of meeting and acted in their corporate capacities from year to year, without regard to state lines or to the precise place of their incorporation. It would be a most ruthless exercise of judicial power, as well as a stretch of judicial authority, to declare all their acts and proceedings beyond our borders null and void at the instance of some complaining or aggrieved member or congregation, who excepts to a new mode of paying dues because adopted outside the state. In levying the tax at Minneapolis, no law of Minnesota was violated and no statute of our own commonwealth was contravened. Neither state is complaining, no power of the corporation was transcended, and, for the reasons given, Derry Council cannot complain that the National Council beyond our borders did what it certainly could have done within them, for the continuance of its existence.

But the appellees insist that if the decree is correct, it ought not to be reversed because the court gave a wrong reason for making it. We will not reverse it if it is correct, though the reason was wrong: *Powell's Estate*, 138 Pa. St. 322, 22 Atl. 92. We have nothing to do with reasons. The appeal is not from them, but from the decree, which may do harm. It is, therefore, contended that even if the proceedings of the Minneapolis convention were not *ultra vires*, and the constitution and by-laws there adopted for the government of this order are valid and binding on the members and subordinate councils, no liability for the payment or collection of the per capita tax is imposed upon the subordinate councils, and no power exists in the National Council to deal with subordinate councils or members for their nonpayment of it, and if the state councils make no provisions for its collection and payment, the National Council is powerless. If this position was taken in the court below, it is not referred to in the opinion of the learned trial judge who heard the case. It is, however, strongly pressed here on behalf of the appellees and deserves our consideration, for corporations of this kind must proceed in strict accordance with their own laws. An examination of the constitution and na-

tional laws for the government of the Junior Order of the United American Mechanics, adopted in Minneapolis in June, 1899, the adoption of which we have held to be valid and binding ⁴²¹ on the order, shows that the body which adopted it was the supreme governing power and that the national constitution and laws are the supreme law. The supreme legislative powers "are lodged in the National Council": Const., art. 7, sec. 1. Among its reserved powers are these: "To provide by law a revenue for the National Council": Const., art. 7, sec. 15, par. 5. "To define offenses against the supreme law and to prescribe penalties therefor": Const., art. 7, sec. 15, par. 8. "To grant charters to state councils, and to provide by law for the issue, revocation, suspension, restoration, and reissue of such charters": Const., art. 7, sec. 15, par. 11. "To enact laws for the promotion of the general welfare of the order": Const., art. 7, sec. 15, par. 27. In article 8, creating its executive department, it is provided, in section 5: "The national councilor shall preside at all meetings of the National Council, and shall at all times enforce the national laws and decrees of the national judiciary." In article 9, providing for the judicial department of the order, section 10, paragraph 7, the national judiciary is given exclusive jurisdiction "of all controversies whatsoever, the character of which is such that there is no inferior tribunal having complete jurisdiction," and by section 11 of said article the national judiciary is further given "original and appellate, but not exclusive, jurisdiction in all matters wherein is involved nonconformity to, violation or construction of, the supreme law of the order." It is further provided in article 10, section 8, that "neither state constitution nor state law shall be in conflict with the supreme law, nor abridge the rights or privileges of a member of the order secured to him by the supreme law." Subordinate councils, to which members directly hold relation, have authority "subject to the laws of the national or state council"; and "membership in a council may be attained only as provided by the supreme law": Const., art. 11, secs. 2, 7. In article 15, section 2, it is provided that "any attempt upon the part of a state council or of a council to enforce any law or constitutional provision in conflict with the supreme law is hereby declared to be insubordination, and punishable as the National Council may by law provide." Among the national laws we find, in section 1 of chapter 21, on the subject of revenue, that the per capita tax "upon every member of the order" ⁴²² is "levied upon the total membership of the order"; and in

section 2 of the same chapter direct jurisdiction of the members of the order is asserted by making it an offense for any member to manufacture or obtain blanks, paraphernalia, or other articles from any source other than the national secretary. In division 6, chapter 1, section 7, of the national laws, it is made an "offense against the order" for a member to resist or willfully obstruct the execution or enforcement of any judgment, mandate, or decree of the national judiciary. This scheme of organization contemplates a direct per capita tax imposed by the supreme body of the order, by operation of its supreme law upon the total membership, and while it provides that this tax may be transmitted to the national secretary by the state councils' secretaries, it cannot be said to impose the tax upon the state council itself, nor to leave it to that body to raise the money by its own methods.

In the case under consideration it seems that a clear majority of the Pennsylvania state council refused to levy this tax, and by their refusal became insubordinate to the supreme authority of the order, and resisted the enforcement of the supreme law. The National Council called upon the state council's secretary for the collection of the taxes, and he in turn called upon the subordinate councils, in which the individual members hold their membership. Under the broad terms quoted from the constitution and laws of the order it does not appear that the National Council is powerless to enforce its decrees when the state council revolts against its authority. The members of the order hold a relation to the National Council, and after it is given power to levy a direct per capita tax and general authority to provide revenue for its maintenance, it cannot be said to exercise such authority only at the will of the state councils. Neither the rate of taxation nor the aggregate amount of the tax levied is determined by the state council. For convenience, the report of the number of members is taken from the reports of that body. But it by no means follows that the refusal of the state council to enforce the collection of the tax is to deprive the National Council of its revenues or of its authority to collect the same from the members directly, or from the local councils to which they belong. The whole plan and scheme of the order show that the National Council has reserved to itself ⁴²³ the right to raise revenue by levying a per capita tax, and it has the right to collect this tax by proceedings against the local councils or the members themselves; and if a state council becomes insubordinate, or even a local council to which the in-

individual member may hold allegiance refuses to make itself the method of collection, the National Council can still deal with the recalcitrant individual member. Neither the liability of the members of the order nor of the subordinate council for them is dependent in any degree upon the consent of the state council.

The objection that the per capita tax cannot be collected because the amount was not "enacted" by a statute of the order is without merit, and borders on hypercriticism. The finance committee of the National Council recommended that the per capita tax for the ensuing year should be fifteen cents, and this recommendation having been approved, the resolution was duly passed that the tax should be paid to the National Council. It had acted, and by resolution, "enacted" the amount of the per capita tax for the ensuing year. This certainly met every requirement. No more formal method of enactment was required by any law of the society brought to our notice, and it certainly was the usual method of transacting such business in such meetings.

Upon a review of the whole case, we are persuaded that the injunction awarded by the court below was improper. The decree is reversed and the bill dismissed at the cost of the appellees.

APPEAL.—A JUDGMENT CANNOT BE REVERSED on appeal if, upon the whole case, it is right, though an erroneous reason may be given for entering it: *Avery v. Popper*, 92 Tex. 337, 71 Am. St. Rep. 849, 49 S. W. 219, 50 S. W. 122.

CORPORATE MEETINGS IN ANOTHER STATE may be held, unless the contrary is expressly provided by the charter, by-laws, or general laws of the state under which the corporation is organized: *Missouri Lead etc. Co. v. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. 488. Compare *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 19 South. 172.

ASSOCIATIONS.—ON THE RIGHTS AND REMEDIES of members of fraternal and other associations, see the monographic notes to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 193-209; *Kearns v. Howley*, 68 Am. St. Rep. 856-871.

McCANN v. McCANN.

[197 Pa. St. 452, 47 Atl. 743.]

WILLS—RULE IN SHELLEY'S CASE.—If there appears on the face of a will sufficient to show that the word "issue" was intended to have a less extended meaning than that of a word of limitation, and to be applied only to children or to descendants of a particular class at a particular time, it must be construed as a word of purchase and not of limitation.

WILLS—RULE IN SHELLEY'S CASE.—A devise of land to a son for his natural life, and "at his death to his next nearest blood relations, share and share alike," creates only a life estate in such son, if the other provisions of the will indicating a general scheme of distribution show that the testator did not intend to use the words "nearest blood relations," as meaning heirs generally.

WILLS—RULE IN SHELLEY'S CASE.—To bring a devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or in tail as a *nomen collectivum* for the whole line of inheritable blood. If the testator annexes words of explanation to heirs, or heirs of the body, as to heirs now living, or the like, using the term as mere *descriptio personarum*, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given, and they take as purchasers.

B. F. Tinkham, for the appellant.

A. A. Vosburg, for the appellee.

457 McCOLLUM, C. J. The question presented by the case stated is whether the plaintiff has a title in fee simple to the land to be conveyed by him in the article of agreement, or only a life estate therein under the devise by the will of his father, Patrick McCann, late of the city of Scranton, deceased. If he has a fee simple, the judgment entered by the court below must be sustained, but if he has a life estate only it must be reversed.

The item in the will under which the plaintiff claims title reads as follows: "7. I give and bequeath to my son, Michael, on his reaching the age of twenty-one years, a lot of land in the eighth ward, said city of Scranton, on Lackawanna avenue, being number eighteen (18), together with all improvements thereon; also a lot of land on Jefferson avenue, ninth ward, said city, being number eighteen, together with all improvements thereon, to have and to hold the same for and during his natural life, and at his death, I give and bequeath said property to his next nearest blood relations, share and share alike." There are other provisions of the will indicating a general scheme of disposition of the testators, which aid interpretation of the clause under consideration. The testator first makes

provision for his wife. She is to have a life interest in all his property not otherwise disposed of in his will, and at her death said property is to go absolutely to his four living children and a deceased daughter, share and share alike, the children of the deceased daughter to receive their mother's interest in equal portions, "to have and to hold the same to them, their heirs and assigns forever." The fourth item of the will gives the homestead, with the household goods therein contained, to the wife for life, and at her death to the testator's daughter, Genevieve, "on her reaching the age of twenty-one years, absolutely to herself, and her heirs and assigns forever." ⁴⁵⁸ The fifth, sixth, seventh, and eighth items of the will make provision for the four living children of the testator by leaving them separate tracts of land for life, with devise over as in the seventh item first above quoted. Similar provisions are made for the five grandchildren. Then comes the following provision: "15. In case any of my said children should die without issue before my decease or before reaching the age at which they would inherit under this my will, then the interest of such child shall be divided equally among my surviving children; the same rule shall also apply to my said grandchildren." The testator further gives specific legacies to his wife for life, and to certain of his children absolutely, including five thousand dollars to his son, Frank, for the purpose of building him a house on one of the lots devised to him, and finally, in the event of his having at his death, "no blood relations," the whole is left to a charity. The testator, in considering the disposition of his property, has divided it into distinct classes or estates, and made a different disposition of each. He has first carved out estates for life, and these estates in specified properties are given to the children and grandchildren. The life estates in the remaining properties, including the homestead, are then given to the widow. These estates with the specific legacies are no doubt considered as provisions for the lives of the respective tenants. The remainders in the residuary estate and in the homestead are given to the children and grandchildren in fee. The remainders in the other properties to "the next nearest blood relations" of the life tenants. The different phraseology used by the testator with so much care in disposing of the different estates in remainder is persuasive evidence that he did not mean the disposing words to be equivalent. The words themselves lead irresistibly to the same conclusion. While "next nearest blood relations" may be heirs, they are not necessarily all of the heirs.

It is only in the event of their being all equally remote from their ancestor that the qualifying words "next nearest" would apply. It is clear from the authorities that in such case the rule in *Shelley's Case* has no application.

Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate for life of the first taker to an estate tail by implication: *Yarnall's Appeal*, 70 Pa. St. 459 342; *Potts' Appeal*, 30 Pa. St. 170. It is well settled that the word "issue" in a will prima facie means "heirs of the body"; and in the absence of explanatory words showing that it was used in a restricted sense, it is to be construed as a word of limitation. But if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children or to descendants of a particular class at a particular time, it is to be construed as a word of purchase, and not of limitation, in order to effectuate the intention of the testator: *Robins v. Quinliven*, 79 Pa. St. 335, and cases there cited. In *George v. Morgan*, 16 Pa. St. 95, it is said that "superadded words of limitation engrafted on words of procreation will not operate to turn these words into words of purchase, unless the superadded words denote a different species of heirs from that described by the first words, thus showing an intent to break the ordinary line of descent from the first taker." Accordingly, in the case of *Powell v. Board of Domestic Missions*, 49 Pa. St. 46, it was decided that a devise to one for life and to issue "if one to him or her, his or her heirs or assigns forever, but if more, then to be equally divided amongst them, their heirs and assigns forever," was not within the rule in *Shelley's Case*. To the same effect is *O'Rourke v. Sherwin*, 156 Pa. St. 285, 27 Atl. 43. In *Kuntzleman's Estate*, 136 Pa. St. 152, 20 Am. St. Rep. 909, 20 Atl. 645, the devise in remainder after a life estate to a daughter was to "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania," if the daughter "survived her mother and husband" and died intestate. At page 152 (136 Pa. St.; page 647, 20 Atl.) Mr. Justice Clark says: "The expression 'such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania,' may perhaps be taken to signify heirs (*Dodson v. Ball*, 60 Pa. St. 492, 100 Am. Dec. 586; *Williams' Appeal*, 83 Pa. St. 377), and it may be assumed that the persons entitled under the words of the entire clause are such persons as at the daughter's death are

heirs at law, exclusive of her mother and her husband. But to bring the devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or in tail as a nomen collectivum for the whole line of inheritable blood. When the testator annexes words of explanation to heirs or heirs of the body, as to heirs now living, etc., using the term as mere descriptio personarum, or for the specific designation ⁴⁰⁰ of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given (4 Kent's Commentaries, 221), and they will be assumed to take as purchasers." The exclusion of the mother as an heir, it was held, took the case out of the operation of the rule in Shelley's Case. Beilstein v. Beilstein, 194 Pa. St. 152, 75 Am. St. Rep. 692, 45 Atl. 73, is not in conflict with this construction, as there were no restrictive words as in this case.

We are of the opinion that Michael P. McCann has only a life estate in the lands described in the seventh paragraph of the testator's will.

Judgment reversed.

IN THE SUBSEQUENT CASE of Brinton v. Martin, 197 Pa. St. 615, 47 Atl. 841, it was decided that a devise to a son "to be held by him for his own use during his life, and at his death to descend to his children, or, in default of children, to his legal heirs," created in such son an estate in fee simple.

RULE IN SHELLEY'S CASE.—A DEVISE to a person named and his heirs may create in him only a life estate: See the monographic note to Carpenter v. Van Olinder, 11 Am. St. Rep. 102; Simonton v. White, 93 Tex. 50, 77 Am. St. Rep. 824, 53 S. W. 339. The rule in Shelley's Case will not be allowed to override the manifest and clearly expressed intention of a testator: Wescott v. Binford, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18; McIlhinny v. McIlhinny, 137 Ind. 411, 45 Am. St. Rep. 186, 37 N. E. 147. Compare the monographic note to Polk v. Faris, 80 Am. Dec. 416.

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FREELAND v. PENNSYLVANIA RAILROAD COMPANY.

[197 Pa. St. 529, 47 Atl. 745.]

NAVIGABLE STREAMS—TITLE BETWEEN HIGH AND LOW WATER MARK.—If a navigable stream is made the boundary by the state, the title passes to low-water mark, with the qualification that between high and low water mark the grantee can use the land for his own private purposes, provided that, in such use, he does not interfere with the public rights of navigation, fishery, and improvement of the stream.

ALLUVION IS AN ACCUMULATION OF SAND, earth, and loose stones or gravel brought down by a river, which, when spread out to any extent, forms what is called alluvial land. It is an addition made to the land by a washing of the seas or rivers, and its chief characteristic is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time.

ALLUVION.—A RIPARIAN OWNER ON A NAVIGABLE STREAM HAS A RIGHT to remove and sell sand which has been deposited as alluvion between high and low water mark on the banks of a stream, as against a railroad company, which, for its own purposes and not for the improvement of the stream, erects an obstruction on the opposite bank so as to change the current and sweep away the sand and prevent all future alluvion. In such case the riparian owner is entitled to recover damages, both for the sand thus swept away and for the loss of future alluvion.

B. F. Junkin and L. E. Atkinson, for the appellant.

W. H. Sponsler and J. M. Sharon, for the appellees.

536 BROWN, J. The plaintiffs are riparian owners along the Juniata river, in Perry county. Their land, consisting of a farm of about one hundred acres, is located on the north bank of the river, which naturally approaches it in a sort of semicircle form. The flow of the water as it comes down toward this land is southeast, until it reaches the apex of the bend, where, before the wrong complained of, it was deflected to the northeast and then passed eastward along plaintiffs' property. Before the construction of the embankment by the appellant on the south bank of the river which caused the injury to appellees, as found by the **537** jury, there came, from immemorial time, with the flowing of the river and the swelling of its waters deposits of valuable sand on plaintiffs' shore between high and low water marks. As certainly as "seed time and harvest and cold and heat" did "not cease," these deposits never ceased in season, so long as the stream flowed as was its wont. Its dashing current in times of high water, after having passed the lowest point of the bend at Trimmer's rock, became a gentle flow when it reached the shore of plaintiffs, from which the grains of sand

settled and imperceptibly formed the alluvium at the bottom. In 1896 the Pennsylvania Railroad Company, in straightening its tracks at Trimmer's rock, built an embankment, which occupies not only the bank of the river, but extends out over and beyond low-water mark. Since its completion the waters of the river in the recurring floods no longer flow past plaintiffs' property in a gentle stream, but, encountering this artificial obstruction, are abruptly turned toward the north bank, and instead of flowing, as from time out of mind before, along plaintiffs' shore, depositing the sand with which they had come freighted, they dash wildly on. The deposits have ceased, and with the current of the stream so changed it is now insisted, as found by the jury, that they will never return. With the loss of this sand the plaintiffs are deprived of a revenue from the sale of it, which was as regular as the return from their crops, and the question on this appeal is whether the railroad company, having by its obstruction of the natural flow of the river deprived the owners of the farm of what they claim was its most valuable incident, must compensate them for the loss. In April, 1896, after the embankment had been built, there was the usual spring flood, and a large quantity of sand that had been deposited was swept away. The verdict of the jury in favor of the plaintiffs was not only for it, but for the loss of future deposits, their finding having been: "For sand bank carried away, thirteen hundred and eighty-two dollars and fifty cents; for destruction of the habit of the farm to gather future sand, eleven hundred and seventeen dollars and fifty cents."

The Juniata is a navigable river. From the original survey of April 28, 1765, down to the deed of March 9, 1829, to the father of appellees, who derive their title from him, every description of their farm gives the river, with its several courses, as a boundary; and their lands, therefore, run to its low-water ⁵³⁸ mark. This has been so long settled and is so generally known that it is hardly necessary to cite the following: "Ever since the case of *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463, decided in 1810, it has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low-water mark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream, between ordinary high and ordinary low-water mark. Variety in the language of the return matters little, so that the intention to make the stream a boundary appears sufficiently in the description and diagram. In deter-

mining this both are taken together. The variety of expression in the decided cases is very great. . . . The result of the cases is, that when a return of survey calls for a stream as its boundary, or to run by, along, up or down it, the title will run to the stream; and the marking of trees on the bank or margin of the stream to identify the lines run to the river, as well as the return of courses and distances measured along the margin, necessarily to ascertain the quantity of land in the survey, will not restrain the title to the bank or margin only. As was said in *Klingensmith v. Ground*, 5 Watts, 458, a corner tree is not always to be had where it is wanted, and then the next most convenient must be taken; or, as in *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278, a surveyor cannot run a curved line with compass, but if a creek is returned as the line there can be no mistake as to it, and the courses and distances along it are to be disregarded": *Wood v. Appal*, 63 Pa. St. 210. "Where a running stream is called for, it is always understood that the ownership extends to low-water mark, and so far has this been held in Pennsylvania that a traverse line has been held technically to pursue the meanders, so as to include the points that would otherwise be thrown out by it. Though the words 'near the creek,' strictly speaking, imply the existence of space betwixt the object immediately expressed and the object of reference beyond it, they indicate, in popular meaning, no more than the whereabouts. Such is the general rule, and what is there to take the case out of it? If the words 'thence up the creek north' do not call for the creek as a boundary, why was the creek mentioned at all?" *Klingensmith v. Ground*, 5 Watts, 458. "In Pennsylvania, wherever a stream is navigable, and it is made the boundary of a grant by the state, the title passes to ⁵³⁰ low-water mark, but no farther": *Johns v. Davidson*, 16 Pa. St. 512.

Though the title of a riparian owner to the soil extends to low-water mark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public rights of navigation, fishery, and improvement of the stream. "This being the navigable character of the stream [Allegheny], the rights of the riparian owners are settled by numerous decisions, a few of which may be referred to: *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Shrunk v. Schuylkill Nav. Co.*, 14 Serg. & R. 71; *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278; *Zimmerman v. Union*

Canal Co., 1 Watts & S. 346; *Bailey v. Miltenberger*, 31 Pa. St. 37; *McKeen v. Delaware etc. Canal Co.*, 49 Pa. St. 424; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597, opinion by Sharswood, J., decided last winter at Philadelphia. From these and other cases it will appear that the absolute title of the riparian proprietor extends to high-water mark only, and that between ordinary high and ordinary low water mark his title to the soil is qualified, it being subject to the public rights of navigation over it, and of improvement of the stream as a highway. He cannot occupy to the prejudice of navigation or cause obstructions to be placed upon the shore between these lines, without express authority of the state": *Wainwright v. McCullough*, 63 Pa. St. 66. "As between themselves, riparian owners are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity." In *Zug v. Commonwealth*, 70 Pa. St. 138, it was held that "an owner of the soil might use the river bed between high and low water marks for his own private purposes, if he did not interfere with the rights of the public": *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88, 15 Atl. 726. In the foregoing is found the clearly defined right of the appellees in the river bed between the high and low water marks. We are next led to the consideration of what the right was in the sand deposited there, which was swept away by the act of the defendant in changing the current of the stream.

Alluvion has been defined to be those accumulations of sand, earth, and loose stones or gravel brought down by rivers, which when spread out to any extent form what is called alluvial⁵⁴⁰ land. It is the addition made to land by the washing of the seas or rivers, and its characteristic is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time: *Angell on Watercourses*, 7th ed., sec. 53. This is practically the definition of the sand or alluvium deposited on the plaintiffs' shore, and the right to it can be no less than that to alluvion, which is ownership in the owner of the land increased: *Gould on Waters*, sec. 155; *St. Clair County v. Livingston*, 23 Wall. 46; *Kinzie v. Winston*, 56 Ill. 56. That these deposits had not been allowed to accumulate and become a visible portion of the land of the appellees abutting on the river, but had been a valuable sediment on the shore between high and low water marks, cannot affect the rule that the accretions belong to the owner of the land. The owners here owned it to low-water mark, the only qualification upon their

right to the use of it between high and low water being that no public right of navigation, fishery, or improvement should be interfered with. In removing the sand no such public right was affected, and the appellees took simply what belonged to them as rightfully as the crops from their fields, the only difference being that in the one case they harvested after sowing, whilst in the other nature without their aid brought them increase. This right to the sand was not only to it in situ, but, with the clearly defined ownership of the appellees between high and low water marks, extended, as the learned trial judge properly held in his charge to the jury, to future deposits. "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil, one. The maxim, 'Qui sentit onus debet sentire commodum,' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not, overflow their banks, and where dikes and other defenses are, and where they are not, necessary to keep the water within its proper limits": St. 541 *Clair County v. Lovington*, 23 Wall. 46. Nothing need be added to these words of Mr. Justice Swayne.

The loss of the sand washed away and of the right to future alluvium having been caused by the defendant, it must compensate the appellees in damages. This liability cannot be evaded, whether the loss resulted from the appellant's exercise of the right of eminent domain or from its act as a riparian owner. The construction of the embankment by the railroad company was for the improvement of its own highway and not of the Juniata river; and if it was constructed under the right of eminent domain, liability to the party injured follows such exercise, to be enforced in trespass: *Northern Cent. Ry. Co. v. Holland*, 117 Pa. St. 613, 12 Atl. 575; *County of Chester v. Brower*, 117 Pa. St. 647, 2 Am. St. Rep. 713, 12 Atl. 577; *Delaware County's Appeal*, 119 Pa. St. 159, 13 Atl. 62. If it acted simply as a riparian owner, it was bound by the rule, "*Sic utere tuo ut alienum non laedas*," disregard of which generally means, not only injury to another, but liability for the wrong committed. "If a riparian owner places a structure upon his own

land between high and low water marks that impedes navigation, he infringes the public right, and subjects himself to liability therefor. His ownership of the land over which the water flows along the shore will not relieve him from the consequences of his act, for his title to the shore is subject to the right of the public in the stream. If he places the structure in such manner as to throw the current against his neighbor's shore at such an angle as to wear it away and undermine and wash out his land, he inflicts a private injury upon his neighbor for which a right to compensation exists. In the case of a private stream, no one would doubt the right of an injured owner to maintain an action for the damages suffered by him by reason of a change in the current. But one has no more right to injure another with the water of a navigable stream than with that of a non-navigable private stream. It is not the character of the stream, but the character and consequences of the act of the owner of the shore that determines the right of the injured party to compensation. As between themselves, riparian owners are owners of the soil, and are bound to observe the obligations that grow out of their ownership and their proximity. In *Zug v. Commonwealth*, 70 Pa. St. 138, it was held that an owner of the soil might use the ⁵⁴² river bed between high and low water marks for his own private purposes, if he did not interfere with the rights of the public. This declaration is, however, to be understood as qualified by the rule we have just considered, that he must not, in the exercise of his right as a riparian owner, inflict injury upon his neighbors. This rule sets limits to the manner in which property of every description may be used, and is unaffected by the accident of location": *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88, 15 Atl. 726.

The damage done to the land of appellees is permanent. Their sand has been washed away and its value destroyed. The river no longer brings, nor will bring, alluvium to the shore, and the farm has lost its most valuable incident. The instruction of the court as to the measure of damages was correct. It is true that, as to future alluvium, the finding of the jury was conjectural. It could not have been otherwise. But the plaintiffs' claim for it was substantial, and the verdict, which cannot be said to be unreasonable, is their compensation for it.

The assignments of error are all overruled and the judgment is affirmed.

ALLUVION IS LAND FORMED by sedimentary deposits and added to an ordinary tract by the imperceptible action of waters bordering on the latter: *Sapp v. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493, 26 South. 378. A riparian owner of land acquires whatever may be added to it by gradual and imperceptible accretion, but he assumes the risk of losing it all by its being washed away by the waters: *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; monographic note to *Coulthard v. Stevens*, 35 Am. St. Rep. 309, on accretion and alluvion.

A GRANTEE OF LAND ON A NAVIGABLE STREAM takes between high and low water mark, subject to the rights of the public; and, as between him and the public, may use his land below the line of high water for such purposes only as do not interfere with the free flow and navigation of the water: *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88, 15 Atl. 726.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

THE J. M. JAMES COMPANY v. BANK.

[105 Tenn. 1, 58 S. W. 261.]

STATUTE OF LIMITATIONS.—AN ACTION BROUGHT AGAINST A BANK TO RECOVER DAMAGES FOR A REFUSAL TO HONOR the check of the plaintiff, who has money on deposit subject to call, is not an action of slander which is barred by a six months' statute of limitations, since such statute applies only to actions for injurious words and not to actions for injurious acts.

BANKS—DISHONORING CHECKS—DAMAGES.—In an action against a bank to recover for a refusal to honor the check of the plaintiff who has money on deposit subject to call, an averment that the plaintiff is a trader is sufficient to entitle him to recover substantial damages, though special damage is not alleged.

BANKS—DISHONORING CHECKS—PLEADING.—In a suit against a bank to recover for a refusal to honor the plaintiff's check, the complaint need not aver that the bank had no lien on the money deposited; if such lien exists it is a matter of defense which must be pleaded.

BANKS—DISHONORING CHECKS—SPECIAL DAMAGE.—In a suit against a bank to recover for a refusal to honor the plaintiff's checks, the plaintiff cannot show that particular persons have ceased to deal with him, unless the loss of their custom is set out in the pleadings as special damage, but testimony showing the general impairment of the plaintiff's credit by the dishonor of these checks may be received.

BANKS — DISHONORING CHECKS — DAMAGES — PRESUMPTION.—In an action against a bank to recover for a refusal to honor plaintiff's checks, where the plaintiff avers and proves that he was a trader, and that his checks were dishonored wrongfully by the bank, the law conclusively presumes that he has sustained damages which the jury, under proper instructions, must fix.

BANKS—DISHONORING CHECKS—DAMAGES FOR LOSS OF CREDIT.—A depositor whose checks have been dishonored wrongfully by a bank may recover not only for the damage to his credit with the persons to whom the checks were given, but for

the injury to his business standing as far as the knowledge of the dishonor of the checks extends.

BANKS — DISHONORING CHECKS — MISLEADING INSTRUCTION.—In an action against a bank to recover for a refusal to honor the checks of the plaintiff who had ample funds on deposit, an instruction regarding the distinction between an absolute refusal to pay the checks and a request for delay to look into the condition of the plaintiff's account, is misleading and prejudicial to the plaintiff, where there is no evidence to justify such instruction.

Thomas H. Jackson and H. C. Warriner, for The J. M. James Company.

Metcalf & Metcalf, for the Bank.

³ BEARD, J. The J. M. James Company, a mercantile firm in Memphis, was, on the nineteenth day ⁴ of March, 1897, a customer and depositor with the defendant bank. On that day it drew several checks in favor of different payees on this bank, which were presented the following day for payment. When so presented payment was refused, and their respective holders were notified of the fact. Subsequently this action of the bank was reconsidered, and the checks were recalled and paid. On April 12, 1898, the present suit was instituted. The declaration of the plaintiff contained five counts, substantially as follows:

1. That the plaintiff was, and had been, engaged as a trader in the mercantile and commission business in Memphis for several years prior to March 19, 1897, and a customer of and depositor with the defendant bank, and that on that day, and for several days prior and subsequent thereto, it had on deposit with the defendant \$3,212.46, subject to plaintiff's checks; that on said day it drew several checks on defendant bank, as follows: One in favor of W. W. James for \$500, one in favor of W. H. Cousins for \$54.51, one in favor of W. H. Cousins for \$2,251.76, and one in favor of the Memphis National Bank for \$250; that said checks were presented on the following day, March 20, 1897, to the defendant bank for payment, whereupon defendant refused to pay said checks, and they were thereby dishonored, and that such refusal was wrongful on defendant's part, and a breach of its contract with ⁵ plaintiff, and plaintiff has suffered great injury therefrom. Wherefore plaintiff has been damaged in the sum of \$75,000 and sues.

2. After repeating the language of the first count, the second count alleged: "The refusal and failure of defendant to pay said checks when it had on deposit more than a sufficiency of

money to pay them, deposited with it by plaintiff, was wrongful, willful, and malicious, and plaintiff has suffered great injury therefrom. Wherefore the plaintiff has been damaged in the sum of \$75,000, and sues."

3. After repeating as in the last count, the third count alleged: "The refusal and failure to pay said checks when it had on deposit more than a sufficiency of money to pay, then deposited by plaintiff with defendant as aforesaid, was wrongful, willful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation; and plaintiff avers that it has been injured in its credit, business, and reputation by the damage thereof, and has suffered to the extent of \$75,000. Wherefore plaintiff sues."

4. After averring as in the former counts, the fourth count alleged: "This failure and refusal on the part of defendant to pay said checks was wrongful, and a breach of its contract with plaintiff; and plaintiff ⁶ avers that it has been injured greatly thereby—its credit has been injured, its reputation hurt, and plaintiff has, in consequence of defendant's said breach of contract, lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has suffered damages to the extent of \$75,000, for which it sues defendant."

5. After averring as in the former counts, and that plaintiff was doing business in the state of Arkansas, Mississippi, and Tennessee, and that it possessed the confidence of the business public in its integrity and fair dealing, said fifth count alleged: "This failure and refusal on the part of the defendant to pay said checks was wrongful, willful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation. The plaintiff further avers that it has been greatly injured and wronged in its credit, business, and reputation; that by said wrong inflicted on it by defendant, plaintiff's credit has been impaired, its business reputation hurt, and as a consequence thereof it has lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has been damaged to the extent of \$75,000, for which it brings this suit."

The defendant demurred to all five of the counts. ⁷ The court below sustained the demurrer to the last four of the counts, and overruled it as to the first, upon which, and a plea to it,

the case was tried, resulting in a verdict of one dollar for the plaintiff. A new trial having been refused, an appeal in the nature of a writ of error has been prosecuted to this court by the plaintiff below. Many errors are assigned for reversal of the cause.

The record is also before us upon a writ of error sued out by the defendant bank, which assigns error to the action of the trial judge in overruling its demurrer to the first count.

One of the contentions presented by the demurrer was that all the counts of plaintiff's declaration were laid in tort to recover damages for slander to the reputation and credit of the plaintiff, and that the suit was barred by the statute of limitations of six months. This somewhat novel view was adopted by the trial judge as to the last four counts, and as to them this ground of demurrer was sustained, but overruled as to the first, the court holding, as we assume, that this count was one *ex contractu*. It is with great earnestness argued by the defendant bank that as to these four counts this is a sound view, and that the judgment of the lower court in this regard should be maintained.

The statute of limitation relied on by the demurrant and applied by the trial court to the 8 counts in question is in these words: "Actions for slanderous words spoken shall be commenced within six months after the words spoken": Shannon's Code, sec. 4468.

It would seem as if it would have been difficult for the legislature to choose words which would more clearly exclude such an action as the present one from the operation of this section, or more apt to embrace alone an action for slander as this offense is defined by the text-books, the reported cases, and by standard lexicographers, both law and literary. All these substantially agree in defining slander as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another: Cooley on Torts, 229, 235; Newell on Slander and Libel, 40; Townshend on Slander and Libel, sec. 3; Rapalje's Law Dictionary, 1198; 3 Bl. 183; Pollard v. Lyon, 91 U. S. 225; Harrison v. Burem, 1 Shannon's Tenn. Cas. 94; Webster's International Dictionary.

But it is urged that slander may be perpetrated by an act or deed, and that when a banker wrongfully rejects his depositor's check as is charged in these counts, he slanders his business reputation and credit as much so as if he had defamed him

in uttered words; that in such case it is the "act speaking," thus bringing the case within the terms of the statute. It is true we often say "actions speak," as in the homely adage, "actions speak louder than words," but this is a mere figure of speech, and by it is meant that the acts or deeds of one convey to others more distinct impressions than mere words, and frequently contradict the latter. But the legislature was not, in passing this statute, refining upon the term "slander." An act may in the sense indicated "speak," but it has no articulate voice, and it is the slander so uttered—that is by spoken words—which is in the spirit and letter of this section.

We have examined the authorities relied on by demurrant to sustain the trial judge in the conclusion reached by him that these were counts in slander within the terms of this section, and by it barred because the suit was brought more than six months after the utterance of the slander, and we can discover in them no support for the contention of demurrant.

Before referring to them it is well to say that in none of the works on libel and slander accessible to us have their authors included what is called by the counsel for demurrant slander by deed or act; slander by spoken words is uniformly the subject of their text. In fact, Mr. Odgers, in the introduction to his work on Libel and Slander, page 7, says: "A man's reputation also may be injured by the deed or action of another, without his using any words, and for which injury he has an action on the case, but such ¹⁰ cases are not within the scope of the present treatise." Among the illustrations of such an actionable injury, but yet outside the limits of a work on slander, the author gives that of "a banker having in his hands sufficient funds belonging to his customer and dishonor his check." Cited to this text are the cases of *Marzetti v. Williams*, 1 Barn. & Adol. 415, and *Rollin v. Steward*, 14 Com. B. 595, and while they support it, they give no color to the present insistence that this act of the banker is slander, either in its technical or common acceptation. On the contrary, Williams, J., in the last-mentioned case, says that such an action is like an action of slander brought by a trader as such for an imputation of insolvency, so far as the right to recover in damages is concerned, thus by implication negating the idea that it was an action of slander.

Upon the basis of the analogy thus suggested between the two actions, as to the right and measure of recovery of damages, rests whatever there may be misleading in the later authorities. Mr. Cooley, in his work on Torts, in note to the text on page

203, says: "It is a species of slander of credit for a bank to refuse to honor the check of his customer who has money on deposit subject to call," citing to his note these two English cases. This is also true as to a foot note found on page 58 of Townshend on Slander and Libel.

¹¹ The only case which the industry of counsel for the demurrant has been able to bring to our attention which gives any support to his contention is that of *Svensden v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 523, 65 N. W. 1086. This, like the two cases already referred to, was an action by a trader against a bank to recover damages for dishonoring his check when it had ample funds of the depositor to meet it. In dealing with the question of the right to substantial damages, the court said: "The case of *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable per se, and general damages may be recovered for such slander."

It is apparent, however, that the court was not treating the case in hand as an action for slander, but was dealing with the act of the bank that was just as effectual in imputing dishonesty or insolvency to its customer as if either had been charged against him by word of mouth, and ¹² in the analogy between the cases found a ground common to both for substantial damages.

This same analogy is pointed out in *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917, *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84, and *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190. These cases, like the others, are dealing with the question of damages properly recoverable upon the mere averment, without more, that the plaintiff was a trader, and all agree that in such a case he should be awarded temperate but substantial damages, for in such a case "it is as in cases of libel and slander, which description of suit it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world": *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51

Am. St. Rep. 139, 23 S. E. 190. We think there can be no doubt the trial judge fell into serious error in treating these counts as counts in slander, and holding them barred by the statute of limitation of six months.

He was equally guilty of error in sustaining the defendant's first ground of demurrer to the second count of the declaration. This count has already been set out. It is in tort. It was a count for a breach of duty growing out of the implied contract of the bank to honor plaintiff's checks as long as he had money to his credit. It was a count *ex delicto*: *Junker v. Fobes*, 45 Fed. ¹³ 840. It alleged that plaintiff was a trader, and as such engaged "in the mercantile or commission business in the city of Memphis," but, as may be seen, avers no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal.

The authorities are uniform that the averment that "plaintiff is a trader" is sufficient, and he is entitled in such a case to recover substantial damages, though special damage is not alleged: *Rollin v. Steward*, 14 Com. B. 595; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190. And in *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917, it is held that the averment, "plaintiff is a trader," supplies the lack of allegations that he suffered special damage, or that the defendant acted out of malice in dishonoring his check.

The assignments of error taken by plaintiff below to the action of the court in the two particulars just mentioned are therefore well taken.

Again, the trial judge was in error in sustaining the following ground of demurrer, to wit: "The defendant demurs for this: The plaintiff fails to aver that the bank did not have a lien on said moneys, which were on deposit as alleged, for an indebtedness due by plaintiff to defendant." It is clear that if such lien existed it was a matter of defense to be brought forward by plea; there is no rule of correct pleading which required ¹⁴ the plaintiff to negative it in its declaration.

Error is assigned upon the action of the trial court in rejecting the testimony of one John Cousins that prior to the dishonor of the checks in question he frequently induced his patrons to send their cotton to the house of plaintiff in error, but that after this time he ceased to do so; and also that hav-

ing lost confidence in plaintiff in error, by reason of this dishonor, he did not send his own cotton.

This testimony was properly rejected. In an action of slander by a trader for defamatory words spoken of him in the way of his trade, no averment of special damage is necessary, because the words are actionable per se: *Bank v. Bowdre*, 92 Tenn. 724, 23 S. W. 131; and in the absence of such averment evidence of general loss of business is always admissible, for this is not special damage. But the plaintiff cannot show that particular persons have ceased to deal with him, unless the loss of their custom is set out in the pleadings as special damage. For it is right that the defendant should be furnished with their names before trial: *Odgers on Libel and Slander*, 318; *Townshend on Slander and Libel*, sec. 345. There is such analogy between the present action and one for slander of a trader, that it is evident the same rule is applicable.

On the other hand, the testimony of Stratton, ¹⁵ the secretary of the plaintiff company, showing the general impairment of the credit by the dishonor of these checks, was within the rule of competency, and was improperly excluded from the jury.

In his summary of the material points which the plaintiff must establish in order to recover, the court said to the jury: "It [the company] must satisfy you that it was damaged by the refusal of the bank to pay its checks, and how it was damaged, and the amount of the same, where it was subject to definite proof."

This was error. Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury under proper instructions to fix: *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84; *Robin v. Steward*, 14 Com. B. 595; *Bank v. Bowdre*, 92 Tenn. 724, 23 S. W. 131.

The trial judge was also in error in the following instruction: "Under the law of this case the only damage that can be considered by the jury is the damage to the credit of The J. M. James Company with the persons or corporations to whom they gave the checks as established by the evidence."

It is evident that this narrow limitation upon the right of recovery by the plaintiff was in the face of the authorities already referred to. The ¹⁶ rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer,

not only with the person presenting it, but necessarily with all persons who are informed of the fact. And if this customer is a merchant or trader, its natural effect is an injury to his business standing as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages measured by all the facts in the case.

The court below was further in error in the following instruction: "If the evidence establishes the fact that there was no absolute refusal to pay said checks, but only a request for delay to look into the condition of The J. M. James Company's account, you will determine from the evidence whether the request was reasonable or was unreasonable, under the facts and circumstances proven. If the request was reasonable, then you will determine whether the delay was reasonable or unreasonable. If you find it to be reasonable, then there can be no recovery in this case. If the request was unreasonable, or the delay was unreasonable in making an investigation of the account of The J. M. James Company, then there can be recovery in this case."

Upon this record it was the duty of the bank to honor these checks on presentation. No excuse was offered in the court below for a failure to do so. No request for an opportunity to examine ¹⁷ the account of this company is shown. There is no pretense that time was needed for examination of the account. In truth, the record discloses that when presented to the bank's teller he was at once informed that the company had to its credit funds to make them good. In view of these facts, and the additional fact that they were paid after several hours' delay, this instruction could not have been otherwise than misleading to the jury and prejudicial to the plaintiff.

The judgment of the circuit court is reversed and the cause is remanded.

Liability of Banks for not Honoring Checks.*

Liability to Depositor.—The principal case states the doctrine generally recognized by the authorities. A bank is obliged to pay the checks of a depositor so long as it has in its possession funds of ~~his~~ sufficient for the purpose which are unencumbered, and if the bank refuses or fails to do so without sufficient justification, the depositor may have an action against it for damages: *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 35 S. W. 911; *Citizens' Nat. Bank v. Importers' etc. Bank*, 119 N. Y. 195, 23 N. E. 540; *Citizens' Nat.*

***REFERENCES TO MONOGRAPHIC NOTES.**

Right of the holder or payee of a check to sue the drawee bank: 96 Am. Dec. 122-135; 45 Am. Rep. 355-357.

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Bank v. Importers' etc. Bank, 44 Hun, 386; **Viets v. Union Nat. Bank**, 101 N. Y. 563, 54 Am. Rep. 743, 5 N. E. 457. The bank is equally liable, although the refusal to pay the check was due to a mere error in bookkeeping, which is liable to occur in any bank and cannot be wholly avoided, and although there was no actual malice or express intention to injure the depositor: **Schaffner v. Ehrman**, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917. The rule holds true, notwithstanding that after the discovery by the bank of its mistake or carelessness it made every effort to rectify the error: **Schaffner v. Ehrman**, 37 Ill. App. 340; affirmed in 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917. In **Citizens' Nat. Bank v. Importers' etc. Bank**, 119 N. Y. 195, 23 N. E. 540, the bank had paid the check once on a forged indorsement, and subsequently, upon a presentation of the check by the real payee, the bank refused to pay on the ground that it had already paid once. But the court held the rule to be well established that a forged indorsement did not pass title to commercial paper, negotiable only by indorsement, and that payment of a draft so affected by a bank, although in good faith, was no payment at all to the true owner, and a refusal to pay on proper indorsement operated as a dishonor of the depositor's check, for which he could have his action. If a bank accepts a check drawn on it, stamps it as paid, and enters the amount to the credit of the payee, this is a payment of the check, and the payee is entitled to draw checks against the amount credited to him. And the fact that the bank subsequently fails to realize upon the check so deposited does not excuse the bank for its failure or refusal to honor the depositor's check, which is drawn and presented before the dishonor of the check which was deposited: **American Ex. Nat. Bank v. Gregg**, 37 Ill. App. 425. The judgment in this case was reversed in 138 Ill. 596, 32 Am. St. Rep. 171, 28 N. E. 839, but the soundness of this doctrine seems not to have been questioned. The same principle was recognized in **Kavanaugh v. Bank**, 59 Mo. App. 540, where a check which was credited to the account of a depositor was lost and had not been collected by the bank in which it was deposited. No steps, however, had been taken to make the depositor liable as an indorser, and the court held that the bank was liable to the depositor for its refusal to honor his check drawn against the amount with which he had been credited, and the fact that the deposited check had been lost and not collected was no defense to the bank. Of course, if the bank has a lien on the deposit, it would not be liable to the depositor for a failure to honor his check: **Mt. Sterling Nat. Bank v. Green**, 99 Ky. 262, 35 S. W. 911. When a bank may properly refuse to pay a check will be considered under a subsequent heading.

Upon the dishonor of his check, a depositor may either sue in assumpsit to recover the amount of his deposit, or in tort for the wrong done to him: **First Nat. Bank v. Shoemaker**, 117 Pa. St. 94,

2 Am. St. Rep. 649, 11 Atl. 304. He is not confined to a suit for his whole deposit: *Citizens' Nat. Bank v. Importers' etc. Bank*, 119 N. Y. 195, 23 N. E. 540. In a tort action to recover for the injury done him, the depositor is not restricted to nominal damages: *Svendsen v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 65 N. W. 1086; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917.

The refusal of the bank to pay a check when the depositor has sufficient funds to meet it amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages: *Svendsen v. State Bank*, 64 Minn. 40, 58 Am. St. Rep. 522, 65 N. W. 1086; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632. The rule is frequently stated to be that the depositor is entitled to recover "temperate" damages: *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190. This apparently means reasonable damages as distinguished from nominal or excessive damages: *Rolin v. Steward*, 14 Com. B. 595. If the depositor is a person engaged in trade, he may recover special damages without proof of malice or any special injury: *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917. This case shows that a single refusal to pay a check might, and frequently does, bring ruin upon a business man, and yet it is impossible to prove special or actual damages. That special damages need not be proved, see, also, *First Nat. Bank v. Railsback*, 58 Neb. 248, 78 N. W. 512; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632. The plaintiff may recover for the loss of credit, though it is not immediately connected with any tangible pecuniary loss of which it was the cause: *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778, 18 Atl. 632. The case of *Burroughs v. Tradesman's Nat. Bank*, 87 Hun. 6, seems to hold that where the depositor sues as for a breach of contract, and the proof shows that the dishonor of the check was occasioned by mistake which was corrected five days later, when the check was paid, the depositor is entitled to recover nominal damages only, where no willful act is charged and special damages are not alleged. And *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764, would appear to hold that substantial damages for loss of credit can be recovered only when the bank's refusal to honor checks was malicious and willful. While this rule may be correct as applied to an action on the contract, it certainly is not the generally recognized doctrine as applied to a tort action. As applied to a trader, the law presumes that damage has resulted if the bank refuses to honor his check, even though such refusal was due solely to a mistake and the bank made every effort to rectify the mistake after it was discovered. The trader's credit and business reputation have been damaged, and perhaps to a very large extent, whether the check is subsequently paid or not: See

Schaffner v. Ehrman, 37 Ill. App. 340; affirmed in 139 Ill. 109, 32 Am. St. Rep. 192, 28 N. E. 917. If, in **Davis v. Standard Nat. Bank**, 50 App. Div. 210, 63 N. Y. Supp. 764, all that the court means by malicious and willful is that the act was intentional and without just cause or excuse, then the rule is correct, for even the refusal to pay a check due to mistake is an intentional dishonor without just excuse. This is recognized by the Illinois case just cited. Malice, however, need not be proved. It is presumed from the fact of dishonor without legal excuse. Where the action is in tort, and is based upon a malicious and wrongful act of the bank, the plaintiff may be awarded damages for the mental suffering and anxiety arising from the fact of the impairment of his credit: **Davis v. Standard Nat. Bank**, 50 App. Div. 210; 63 N. Y. Supp. 764. Though if the action is on contract he cannot recover for injuries to the feelings. A depositor can only recover for the damages which may reasonably be expected to arise from the breach of the contract to honor his checks. Hence, where after the dishonor of plaintiff's check a judgment was immediately entered against him and his entire business was seized by the sheriff, this could not be deemed such injury as would naturally arise from the refusal of the bank to pay the plaintiff's check for a comparatively small amount, and he cannot recover for such injury: **Brooke v. Tradesman's Nat. Bank**, 69 Hun, 202; 23 N. Y. Supp. 802. A similar rule was announced in **Bank of Commerce v. Goos**, 39 Neb. 437, 58 N. W. 84, where the depositor's check to one Rush was dishonored, whereupon Rush caused the depositor to be arrested, and by reason of the wide publicity of the arrest his business was very greatly damaged. The court held that the prosecution and imprisonment of the depositor, and the published statements in relation thereto were not the natural result of the refusal of the bank to honor his check, and damages resulting therefrom could not be recovered from the bank.

When Bank may or may not Refuse to Pay Checks.—In determining whether a bank is liable for dishonoring a check, it is frequently necessary to ascertain whether the bank is justified in refusing payment. Naturally, if there are no funds in the bank to the credit of the depositor the bank need not honor the check. The rule is equally true where the funds are insufficient to pay the check in full: **Coates v. Preston**, 105 Ill. 470. The bank is under no obligation to make a part payment on the check to the amount of the funds on deposit: **Jacobson v. Bank of Commerce**, 66 Ill. App. 470; **Harrington v. First Nat. Bank**, 85 Ill. App. 212; **Henderson v. United States Nat. Bank**, 59 Neb. 280, 80 N. W. 898; **Lowenstein v. Bresler**, 109 Ala. 326, 19 South. 860. A payee has no right to the actual balance on deposit to the credit of the drawer where the check is for a larger amount: **Dana v. Third Nat. Bank**, 13 Allen, 445, 90 Am. Dec. 216. Even where a bank has frequently allowed its depositor to overdraw his account and has constantly paid such

checks, the bank is under no obligation to continue to pay them, in the absence of an agreement that such a course would be continued: *Schoonmaker v. Gilmore*, 84 Ill. App. 17; *Springfield Marine Bank v. Mitchell*, 48 Ill. App. 486. In some states a check operates as an assignment of the amount named in the check to the payee; but this rule has no application where the check is drawn for an amount greater than the sum on deposit. In such a case the payee acquires no title to the sum actually on deposit: *Henderson v. United States Nat. Bank*, 59 Neb. 280, 80 N. W. 898; *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154.

As a general rule, a bank may refuse to pay the checks of a depositor where at the time of presentation the depositor owes the bank a debt, past due, larger in amount than the sum on deposit: *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 35 S. W. 911; *Schuler v. Laclede Bank*, 27 Fed. 424; *Ehlermann v. St. Louis Nat. Bank*, 14 Mo. App. 591; *Bank v. Brewing Co.*, 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054. Indeed, it is not requisite that the amount due the bank should be in excess of the amount on deposit. If the account is past due, the bank may treat the cross-demands existing between them as compensated so far as they equal each other, and credit the demands accordingly. Then, if there is not a sufficient balance standing to the credit of the drawer to meet his check, payment may be refused for want of funds: *Bank v. Brewing Co.*, 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054. If the bank has a right to appropriate the deposit to the payment of the drawer's debt to it, and to refuse payment of a check, its refusal to honor the check operates as an appropriation of the amount on deposit to the payment of the debt: *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 35 S. W. 911. There are circumstances under which a bank is not privileged to set off a debt due it against the balance on deposit and refuse to pay checks. Thus, where the bank contracts to pay the checks drawn by a firm or one of its members, the bank cannot, in violation of its agreement, appropriate a deposit to satisfy the individual debt of one of the partners: *Chaunte Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575. In Louisiana it seems that a bank cannot apply funds on deposit to the payment of a debt due it by the depositor, without the special assent of such depositor. Consequently, a bank cannot refuse to apply funds on deposit to the payment of a check simply because the depositor is indebted to the bank on an overdue debt: *Gordon v. Muchler*, 34 La. Ann. 604. In *Simmons etc. Co. v. Bank*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502, where the depositor kept two accounts at a bank, one a general merchandise account, the other his cotton business account, and notwithstanding constant balances against the depositor on the cotton account, the bank had long continued the habit of paying all checks drawn on the merchandise account, it was held that the bank could not, without previous notice to the depositor, refuse payment of a check drawn by him on funds to his credit on the

merchandise account, upon the ground of his indebtedness on the cotton account. If the debt of the depositor is not yet due, the bank has no right to appropriate a deposit to its payment and to refuse to honor a check on this account: *Zelle v. German Sav. Inst.*, 4 Mo. App. 401. And this is true although the depositor is insolvent and the bank will otherwise lose its debt: *Merchants' Nat. Bank v. Robinson*, 97 Ky. 552, 31 S. W. 136; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398. When a bank refuses payment of a check because the depositor has no funds, there is no presumption that the check remains outstanding for payment, and the bank is under no duty to reserve from a future deposit an amount sufficient to satisfy it: *Gilliam v. Merchants' Nat. Bank*, 70 Ill. App. 592.

We are not concerned in this note with the question whether the giving of a check operates as an assignment of the amount of the check to the drawee. This has been fully treated in 19 Am. St. Rep. 609-612. It will be pertinent, however, to call attention to one or two results which flow from the doctrine that a check operates as an assignment of a deposit to the extent of the amount named therein. We have stated the general rule to be that a bank may retain the amount of a deposit to pay a past due debt to itself, and refuse to honor the depositor's check on this account. Where, however, the check operates as an assignment of a portion of the deposit, and the check is presented before the deposit has been appropriated to the payment of the debt due to the bank, a different rule prevails. In such a case the bank cannot refuse to pay because the drawer owes an overdue note. Here the rights of innocent third parties have intervened, and the bank must honor the check: *Niblack v. Park Nat. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203, 48 N. E. 438; *Gordon v. Muchler*, 34 La. Ann. 604; overruling *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590. Another result of this doctrine that a check is an assignment of the fund on deposit is that the drawer cannot stop payment thereof after it has passed into the hands of a bona fide holder. Upon presentment of the check by such a holder for value, the amount called for by the check is thereby absolutely appropriated to the holder, if the drawer's deposit is sufficient, and the bank cannot refuse payment, notwithstanding the drawer's orders to the contrary: *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 49 N. E. 420. In jurisdictions where a check is not an assignment of the deposit this would not be true, a depositor being at liberty to stop payment on his checks if he desires, and an order from the drawer not to pay outstanding checks which may be presented will justify the bank in its refusal to pay such checks: *Dykers v. Leather etc. Bank*, 11 Paige, 612.

Liability to Holder of Check.—The authorities are divided upon the question whether a bank is liable to the holder of a check upon its refusal to pay such check, the drawer having sufficient funds on deposit with which to meet it. The weight of authority, perhaps, is

in favor of the doctrine that the bank is not liable to the holder of the check, there being no privity of contract between the holder and the bank. Probably the leading case on the question is *Bank of the Republic v. Millard*, 10 Wall. 152, which has been repeatedly cited, and has had great weight in establishing the doctrine. The reason for the rule is so well stated by the court that we can do no better than to quote its words: "It is very clear that he [the holder] can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty, and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge, is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository." The eminent judge here referred to was Judge Gardiner, who seems to reach a similar conclusion in *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464. That a bank is not liable to the holder of a check on contract for a part of the amount deposited, see *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185, 40 Am. Rep. 142; *Planters' Bank v. Merritt*, 7 Heisk. 177; *Hawes v. Blackwell*, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245; *Satterwhite v. Melzer* (Ariz.), 24 Pac. 184; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *First Nat. Bank v. Whitman*, 94 U. S. 343. The bank is not liable until after it has accepted the check: *Northumberland Bank v. McMichael*, 106 Pa. St. 460, 51 Am. Rep. 529; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. 582; *Dickinson v. Coates*, 79 Mo. 251, 49 Am. Rep. 228; *Dowell v. Banking Assn.*, 62 Mo. App. 482. Acceptance is, however, a question of fact: *North-*

Lumberland Bank v. McMichael, 106 Pa. St. 460, 51 Am. Rep. 529. And in *Saylor v. Bushong*, 100 Pa. St. 23, 45 Am. Rep. 353, the court went so far as to hold that acceptance might be implied from the circumstance that in settling the drawer's account the drawees retained an amount sufficient to meet an outstanding check drawn in favor of the plaintiff. The fact that the drawee has promised the drawer of the check to accept and pay the same will not render the drawee liable to the holder, unless the latter has taken the check on the faith of such promise: *Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6. Knowledge that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them: *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55. The holder or payee of the check cannot maintain a suit against the bank, although there stands on the books of the bank to the credit of the drawer a sum more than sufficient to meet the check: *Cincinnati etc. R. R. Co. v. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700, 42 N. E. 700; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417; *Moses v. Franklin Bank*, 34 Md. 574. The fact that a check is drawn upon a public depository by an officer of the government in favor of a public creditor does not alter the rule and make the drawee liable to the holder of the check: *Bank of the Republic v. Millard*, 10 Wall. 152. In some of the states the authorities have not always been uniform, the courts wavering in their allegiance to one rule or the other. Thus, in Missouri, the cases of *McGrade v. German Sav. Inst.*, 4 Mo. App. 330, *Zelle v. German Sav. Inst.*, 4 Mo. App. 401, *Senter v. Continental Bank*, 7 Mo. App. 532, and *State Sav. Assn. v. Boatmen's Sav. Bank*, 11 Mo. App. 292, all seem to hold clearly that the holder of a check may maintain an action against a bank having funds of the drawer, and failing to pay on presentment and demand. It was not until *Dickinson v. Coates*, 79 Mo. 251, 49 Am. Rep. 228, was decided that these earlier cases were expressly overruled and the doctrine firmly established that under ordinary circumstances the holder of a check cannot sue the drawee bank upon its refusal to pay the check.

There is almost an equal array of authority upon the side that a check holder may sue the drawee bank if it refuses to honor the check, where the drawer, at the time the check was presented, had sufficient funds on deposit with which to pay the check. The check need not be accepted in order to fix the liability of the bank: *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502; *Fogarties v. State Bank*, 12 Rich. 518, 78 Am. Dec. 468; *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146; *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510, 47 N. W. 632; *Munn v. Burch*, 25 Ill. 35; *Gordon v. Muchler*, 34 La. Ann. 604; *Chaunte Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575; *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179; *Lester v. Given*, 8 Bush, 357.

The bank is held liable upon its implied promise to pay out the deposits upon the check of the depositor. Where the depositor has indicated by his check the person to whom the money shall be paid, the promise of the bank inures to the benefit of the person thus indicated, and he may enforce it: *Roberts v. Corbin*, 26 Iowa, 315, 96 Am. Dec. 146. The rule was thus stated in *Simmons etc. Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502: "When a bank receives the money of a depositor and places the amount to the credit of such depositor on his deposit account, the implied contract on the part of the bank is, that it will pay all checks drawn by the depositor, in such amounts and to such persons as may be mentioned in such checks, as long as there remains to the credit of the depositor on such account an amount sufficient to pay such checks." And in speaking of the want of privity between the holder and the bank, the same case adds: "It is an entire mistake to say, as has been said in some of the cases, that there is no privity between the bank and the holder of the check, for, as we have seen, the contract of the bank is to pay any person who may present the check of the depositor, it matters not who he may be. In this respect it is analogous to the case of an ordinary promissory note, payable to a named payee, or order; what particular person may, by the order of the payee, become entitled to receive the money mentioned in the note may not be known to either maker or payee at the time the original promise was made, but no one ever supposed that there was any want of privity by reason of that fact between the maker of the note and the person to whom it was indorsed. So here the promise of the bank is to pay to whoever may be named in the check, and, therefore, upon the breach of such promise the person named has a right of action for such breach." In *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510, 47 N. W. 632, the court, while adopting the rule that there is sufficient privity between the bank and the holder of the check to sustain a right of action, says that this is really immaterial in view of the well-settled rule that a third party may sue on a promise made on sufficient consideration for his own benefit, though it be made to another and not to himself. This would seem to be a sufficiently sound basis upon which to rest the right of a holder of a check to sue the bank on which it is drawn, where there are sufficient funds on deposit. In those states where a check operates as an assignment of the deposit and transfers title to the check holder, the right of such holder to sue the bank would unquestionably be sustained: *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510, 47 N. W. 632; *Munn v. Burch*, 25 Ill. 35; *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179. In order to charge the bank with the amount named in the check, there must be funds in the bank at the time the check is presented: *Bank v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029; *American Exchange Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547, 22 N. E. 523; *Lester v. Given*, 8 Bush, 357. If, at the time a check is drawn, the

drawer has a sufficient deposit to meet it, and the bank is given notice of the check, the bank must hold the money to meet the check, and the bank cannot, after such notice, pay the deposit to the drawer: *Lester v. Given*, 8 Bush, 357. If, however, the bank has no notice of the existence of the check, it may rightfully pay out the money on deposit, and is not liable for dishonoring the check when it is presented: *Bank v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029. A bank cannot inquire into the legality of the means by which the drawer obtained his funds, and for this reason refuse to honor a check, where there are funds on deposit sufficient to meet the check: *First Nat. Bank v. Randall*, 1 Tex. App. Cas. sec. 971. And where there is no defense to a check in the hands of a payee the fact that the transfer of the check by the payee to a third person is not a bona fide assignment will not justify the bank in refusing to pay the check at the request of the drawer, and such a refusal will render the bank liable to the holder of the check: *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. 179.

If a payee takes a check knowing that the depositor has no funds in the bank, he cannot recover the amount from the bank, notwithstanding the bank credited him with the amount. This does not amount to payment, and the holder can retain no credit obtained by his fraud: *Petersen v. Union Nat. Bank*, 52 Pa. St. 206, 91 Am. Dec. 146. Where a depositor gives a check on a bank in which he has funds, and afterward makes a general assignment for the benefit of his creditors, and the check is presented for payment after such assignment is made and payment is refused, the holder cannot sue the bank to recover the amount of the check, although at the time the check was presented for payment the bank did not know of the assignment, but learned of it before making payment, and for that reason refused to pay the check: *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 54 Pac. 434.

A distinction seems to have been drawn in some of the cases between a check for an entire deposit and one for only a part of a deposit, as affecting the right of a holder to sue the bank. Hence, in some of the jurisdictions which ordinarily refuse to sustain an action by the holder of a check against the bank, the holder is held to be entitled to sue where the check covers the entire amount on deposit: *Dowell v. Banking Assn.*, 62 Mo. App. 482; *Covert v. Rhodes*, 48 Ohio St. 73, 27 N. E. 94; *Hawes v. Blackwell*, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245; *Mandeville v. Welch*, 5 Wheat. 277; *Kingman v. Perkins*, 105 Mass. 111; *First Nat. Bank v. Dubuque etc. Ry. Co.*, 52 Iowa, 378, 35 Am. Rep. 280. The reason for this holding seems to be that the check having been made for the entire deposit operates as an equitable assignment of the entire debt due from the bank to the depositor: *Covert v. Rhodes*, 48 Ohio St. 73, 27 N. E. 94; *Moore v. Davis*, 57 Mich. 251, 23 N. W. 800. As is said in *Hawes v. Blackwell*, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245: "If the depositor had given his check for the whole of his

deposit, the holder might maintain his separate action against the bank if it refused to pay the same, subject to its rights as to checks on the deposit paid before notice of such check, and likewise subject to its rights of setoff. This is so, because the check for the whole deposit would be, in effect, an assignment of the depositor's whole debt against the bank to the holder of such check. He, being the real owner of the deposit—the debt—might sue for it in his own name." This rule, however, is not universally recognized: See *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55.

Under a previous heading we have seen when a bank may properly refuse to pay a check. All of these cases are authority for the rule that when a bank has lawfully refused to honor a check, it is not liable to the holder for the amount named therein.

THOMPSON v. STATE.

[105 Tenn. 177, 58 S. W. 213.]

INDICTMENT, WHEN CHARGES BUT ONE OFFENSE.—AN INDICTMENT which charges the defendants with making a joint and unlawful attempt to dispose of a dead human body for profit charges but one offense, notwithstanding it states a failure to bury the body and a conspiracy not to bury it, since these statements are in the nature of a description or inducement, a mere narrative of the facts leading up to the main offense.

CRIMINAL LAW—SALE OF DEAD HUMAN BODIES.—The unauthorized disposition and sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*.

CRIMINAL LAW—ATTEMPT TO SELL DEAD HUMAN BODY.—An attempt to sell, without authority, the dead body of a human being is a misdemeanor, indictable and punishable at common law.

CRIMINAL LAW—PRINCIPAL AND AGENT—JOINT WRONGDOERS.—Where a principal and his agent participate as such in the commission of a misdemeanor, they are joint principals, since the criminal law does not recognize this civil relation.

CRIMINAL LAW—PUNISHMENT—FINE AND IMPRISONMENT.—Where an offense is punishable by both fine and imprisonment, a trial judge may, after a jury has found a defendant guilty and assessed a fine against him, superadd imprisonment.

CRIMINAL LAW—JOINT PRINCIPALS—PUNISHMENT.—Although joint actors in the commission of a crime are jointly tried and convicted, each may be separately punished as if he had committed the offense alone and must respond in full to his own separate sentence.

John T. Moss and M. B. Norfleet, for Thompson.

Attorney General Pickle, for the state.

¹⁷⁸ CALDWELL, J. Frank Thompson and E. D. Thompson are under conviction for a joint attempt to dispose of and sell for profit and gain to themselves the dead body of Jennie McGuire, a pauper, which was intrusted to them for burial; and the punishment assessed against each of them is a fine of seven hundred and fifty dollars and imprisonment in the county work-house for the period of eleven months and twenty-nine days.

Having appealed in error, they seek a reversal for numerous reasons, assigned by their counsel. It is said, in the first place, that the indictment ¹⁷⁹ charges three separate offenses in one count: 1. Failure to bury; 2. Conspiracy not to bury, but to sell; 3. Attempt to sell; and hence, that the motion to quash should have been sustained in the lower court and should now be sustained in this court.

The indictment does state that the body in question was delivered to E. D. Thompson, county undertaker, for burial; that he and Frank Thompson confederated and conspired not to bury, but to dispose of it for profit and gain to themselves, and that thereupon they packed it in a trunk and shipped it away for the purpose of sale, etc., yet the true legal import of the charge, when rightly interpreted, is that the two defendants made a joint and unlawful attempt to dispose of the body for profit and gain to themselves; that is the real gravamen of the state's action, so to speak, the other parts being in the nature of mere description or inducement, and largely unnecessary. It is an indictment on the facts of the case, with some superfluity of narration. The statement of the failure to bury the body is not to be taken as a separate and distinct charge, but rather as a mere narrative of a fact leading up to the offense of shipping the body away for unauthorized sale; and the other statement that the defendants confederated and conspired not to bury, but to sell, the body is only an over-formal charge of joint action on ¹⁸⁰ their part in the attempted sale, and not an independent charge of unlawful conspiracy. Then, does the indictment, so interpreted and limited, charge an offense cognizable in a criminal court? Confessedly, we are without a statute creating such an offense; hence, unless it existed at common law or can properly be evolved from the principles of the common law, either of which would be sufficient, it does not exist at all.

Civilized countries have always recognized and protected as sacred the right to Christian burial and to an undisturbed repose of the human body when buried.

The willful, unlawful, and indecent taking and carrying away of the dead body of an unknown person, with the intent to sell and dispose of the same for gain and profit, to the scandal and disgrace of religion and in contempt of the laws and customs of the realm, was held to be an indictable offense in *Rex v. Gilles*, 1 Russ. 464; Russ. & R. 366, note. And the disinterment of the body of a human being for the purpose of dissection was held to be indictable at common law in *Rex v. Lynn*, 2 Term Rep. 733; 1 Leach, 497, and in *Kanavan's Case*, 1 Me. 226. These cases, and many others with kindred rulings, are cited and more elaborately stated on pages 391 and 392 of Roscoe's Criminal Evidence, on page 464 of 1 Russell on Crimes, and in note A, 42 L. R. A. 733. One of the other ¹⁸¹ cases is more closely related to that now before the court. Of it Roscoe says: "In *Regina v. Feist, Dears. & B. C. C.* 590, 27 L. J. M. C. 164, the defendant was the master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination; and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to a hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offense at common law in disposing of a body for dissection," but the appellate court, though approving that finding, held that he was protected by statute: Roscoe's Criminal Evidence, 392.

Bishop, in the course of his chapter on "Protection to the Public Morals, Religion, and Education," employs the following language, namely: "Moreover, as tending to corrupt the public morals, and as disturbing the sensibilities of the people, are such acts as casting the dead body of a human being into the river without the rites of Christian sepulture; the stealing of a corpse; the digging of it up, where buried, or ¹⁸² conveying of it away from the burial ground for sale or for dissection; and the selling, for dissection, of the dead body of a person capitally convicted and executed, when the sentence did not direct such disposition of it. These are all indictable offenses at the common law": 1 Bishop's Criminal Law, sec. 950.

It is broadly stated by numerous authorities that every attempt to commit a felony or a misdemeanor, whether the at-

tempted offense be such at common law or by statute, is itself a misdemeanor at common law: Clarke's Criminal Law, 104; Roscoe's Criminal Evidence, 282; Bishop's Criminal Law, sec. 683; 1 Russell on Crimes, 47, and citations by all of them.

Bishop says, however, by way of exception or qualification, that "no mere attempt to commit some of the smaller misdemeanors is a sufficient dereliction from duty to be indictable" (Bishop's Criminal Law, sec. 684), and that "some offenses cannot have the appendage of attempt because of their little magnitude": Bishop's Criminal Law, sec. 687.

The substance of the rule enunciated in the second edition of 3 American and English Encyclopedia of Law, pages 252, 253, is that an attempt to commit a misdemeanor is not indictable at common law, when the offense attempted is merely *malum prohibitum*, but only when it is *malum in se*, and that some misdemeanors that are *mala in se* ¹⁸³ are of such a nature as not to admit of indictable attempts to commit them.

This court held, in *Whitesides v. State*, 11 Lea, 474, that an attempt to commit a misdemeanor that "is purely statutory" is not indictable at the common law.

But without multiplying citations or dwelling further upon the contrariety of opinion in the particulars indicated, it may be safely stated that the authorities are harmonious on the proposition that the unauthorized disposition and sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*, and that an unsuccessful attempt to commit that offense is itself a misdemeanor, indictable and punishable at the common law.

It follows, therefore, that the present indictment, which charges such attempt, and that only, is good, and that the motion to quash was properly overruled.

The other objections urged against the judgment below do not require elaborate consideration. Of those directed against the court's rulings as to the admissibility of certain evidence and against the charge to the jury, it is sufficient to say, generally, that none of them present any reversible error.

The evidence of guilt on the part of each defendant is plenary. It shows that Jennie McGuire, a white woman and pauper, died in the ¹⁸⁴ poorhouse of Shelby county, Tennessee; that after suitable preparation her dead body was, by direction of the superintendent of that institution, delivered to the defendant, E. D. Thompson, as county undertaker, for burial; that thereafter he and the other defendant, Frank Thompson, who was in his

employment, placed the body in a short metal box, which, after sealing, they put in a trunk; that this trunk, when securely locked, and three others, each containing the dead body of a negro, similarly packed, were by them shipped to St. Louis, Missouri, where the defendant, Frank Thompson, was apprehended by officers of the law with the four trunks and their contents in his charge, and whence they were to be transported, at his instance, to Keokuk, Iowa, under a fictitious name, but in fact for a certain person of that city who was to pay fifty dollars for each of the four bodies for purposes of dissection.

The defendants are not protected by chapter 206 of the acts of 1899, which provides for the disposition of certain unclaimed bodies, because they made no effort to comply with the requirements of that act, but pursued their own course without reference to it. They are equally without the protection of the last clause of section 6775 of Shannon's Code, which authorizes dissection "by consent of relatives," for they had no such consent. The only surviving relative of Jennie McGuire, so far as known, was a brother residing ¹⁸⁵ in another state, and he seems to have been entirely ignorant of her death until after her body had been taken to St. Louis. The only authority the defendants had in respect of this body was to give it decent burial; and that authority was violated in the manner already stated, and that, too, long after E. D. Thompson had been admonished by a proper representative of the county that he had no right to sell for dissection bodies intrusted to him for burial.

It is of no legal consequence that Frank Thompson may have been but an employé of his codefendant, nor that one of them may have done more than the other in unlawful effort to dispose of and sell this body, since the criminal law does not recognize the civil relation of principal and agent, and treats all participants in the commission of misdemeanor as joint principals: *Atkins v. State*, 95 Tenn. 474, 32 S. W. 391; *Whitesides v. State*, 11 Lea, 475.

The offense of which the defendants have been convicted is punishable by both fine and imprisonment, or by either (1 Bishop's Criminal Law, sec. 719), and after the jury had found them guilty and assessed a fine against them, it was within the province of the trial judge, in the exercise of a sound discretion, to superadd imprisonment as he did.

Though joint actors in the commission of the same offense, and jointly tried and convicted, it ¹⁸⁶ was proper that punishment be inflicted upon the defendants separately, as if each had

committed the offense alone (1 Bishop's Criminal Law, sec. 732); and each is bound to respond in full to his own separate sentence, satisfaction, in whole or in part, of that against one of them not satisfying that against the other one in any sense or to any extent.

Let the judgment be affirmed.

SELLING OR DISPOSING OF A DEAD BODY for gain or profit is a misdemeanor at the common law and indictable: See the monographic note to *Wynkoop v. Wynkoop*, 82 Am. Dec. 515. Consult, also, the extended note to *Keyes v. Konkel*, 75 Am. St. Rep. 426.

NEW MEMPHIS GASLIGHT COMPANY CASES.

[105 Tenn. 268, 60 S. W. 206.]

CORPORATIONS—DEED, WHEN EXECUTED BY.—A deed is executed by a corporation and is not the mere act of its officers, where the instrument on its face purports to be the deed of the corporation, and the in testimonium clause recites that the company has caused its corporate seal to be attached and the deed to be signed by its president and secretary, and the corporate seal is in fact attached, and the president and secretary have signed in their official capacities.

TRUST DEEDS—GRANTOR RESERVING RIGHT TO SELL—WHETHER VITIATE DEED.—A mortgage or trust deed which reserves to the mortgagor the right to sell or exchange the property covered by the conveyance when deemed expedient is not vitiated by such reservation, since this power does not involve the power to convey, which is alone in the trustee, and a complete conveyance can be made only by the trustee and for the purposes of the trust.

CONTRACTS—CONSTRUCTION.—Written contracts should be construed so as to give them operative effect rather than to destroy them.

COLLATERAL SECURITY, HOLDER OF PROPERTY FOR.—One who loans money to a corporation and receives its bonds as collateral security is a holder of such bonds for value in due course of trade, and as such entitled to protection.

CORPORATIONS—BONDS—BONA FIDE HOLDER—SURETY.—A surety who pays the debt of a corporation, and receives the note of the corporation for the amount so paid secured by a pledge of bonds of the corporation, is a bona fide holder for value of such bonds, and as such entitled to protection.

CORPORATIONS—BONDS—PLEDGE OF, BY DIRECTORS.—Directors of a corporation have power both to pledge and to sell bonds, which are issued to pay a floating indebtedness for improvements, and to make new improvements, and to retire a previous bond issue, where such directors are authorized by a vote of the stockholders to use the bonds in such manner as in their discretion and judgment is deemed best.

CORPORATIONS—PLEDGE OF BONDS TO SECURE DEBT ON WHICH DIRECTOR IS LIABLE.—Directors of a corporation are not disqualified from voting to apply corporate bonds to secure debts of the corporation upon which they are liable, or which are held by corporations in which they are interested, especially where they are in effect authorized so to do by a vote of the stockholders.

CORPORATIONS—DIRECTORS DEALING WITH—SECURING THEMSELVES.—A director is not forbidden, by reason of his position, from dealing with the corporation. Hence, where the corporation is a going concern, continuing and expecting to continue business, a director may secure indemnity from it against possible loss from accommodation indorsements he has made for it.

CORPORATIONS—DIRECTORS DEALING WITH, CLOSELY SCRUTINIZED.—All transactions between a corporation and its directors, whereby the latter secure benefits, are closely scrutinized by the court, and must be shown to be characterized by the utmost good faith.

CORPORATIONS—INSOLVENT—TRUST FUND DOCTRINE.—The doctrine that the assets of an insolvent corporation are a trust fund for the benefit of creditors will not be applied so as to invalidate a pledge of corporate bonds, and the corporation will not be declared insolvent, where the bill which contains such a prayer alleges, and the evidence shows, that the corporation was solvent at the time the bonds were pledged, and would have continued a solvent and going concern but for unforeseen events.

CORPORATIONS—SALE OF ALL OF THE PROPERTY UNDER MORTGAGE.—A sale of the entire property of a corporation under a mortgage foreclosure will not be set aside on the ground that the directors in bad faith united with others in purchasing at a greatly reduced price, where the sale was fair, open, and public, the directors were creditors of the corporation, and the sale was forced by other creditors and bondholders of the corporation.

CORPORATIONS—SALE OF PROPERTY—PURCHASE BY DIRECTORS.—A director who in good faith loans his credit to the corporation and takes its bonds as indemnity acquires the same right as any other mortgagee to protect himself, even to the extent of being a purchaser at a foreclosure sale, which is rendered inevitable through no fault of his.

MECHANIC'S LIEN—MORTGAGE—PRIORITIES.—The rights of the holder of a mechanic's lien are inferior to the rights of a purchaser under a mortgage, where the materials were not furnished until after the registration of the mortgage, and without notice to the mortgagee, though the contract to furnish the materials antedated the mortgage.

PLEADING—CROSS-BILL.—There is no occasion for filing a cross-bill, and it may be dismissed where the relief prayed for can be properly granted under the answer to the original bill.

ATTORNEYS AT LAW—FEES—LIEN FOR.—An attorney at law who has rendered valuable services to his client is not entitled to have a lien declared for compensation for such services, where there is no fund under the control of the court upon which it could fix a lien, and no adverse parties against whom a decree in his favor could be rendered.

T. D. Young, Carroll, McKellab & Bullington, and Turley & Turley, for Rawlins.

B. W. Hirsh, W. W. McDowell, T. K. Riddick, Scruggs & Roseborough, and Metcalf & Metcalf, for the gaslight company.

271 BEARD, J. The Memphis Gaslight Company was a corporation organized under the laws of this state for the purpose of manufacturing and furnishing gas to the city and citizens of Memphis.

On the first day of April, 1873, a trust deed **272** conveying all of its property, rights, and franchises was made by the corporation to S. P. Read, as trustee, to secure the payment of \$240,000 of its bonds, payable to bearer in the city of New York, each bond having attached interest coupons falling due semi-annually; these bonds are still outstanding. For many years the company was very successful, paying large dividends to its stockholders, in addition to meeting the interest on its bonds, but in the course of time another gas company was organized in Memphis, and a fierce competition for patronage at once ensued. In order to compete with its rival, equipped with modern economic appliances, as well as to replace with new machinery that which from the wear and tear of years had degenerated, in 1891 and the early part of 1892, the Memphis Gaslight Company found it necessary to expend large sums of money for betterments. In making these a floating debt of about \$135,000 was created, and yet it became apparent to all interested in the company that all needed improvements were not made, and to complete these at least \$25,000 more would be required. This debt already existing taxed the credit of the company, and was a burden upon some of its directors, who had loaned their names to give additional strength to the paper of the corporation issued by it to carry on these improvements. In view of this condition the stockholders convened, according to a call properly made **273** on the 30th of June, 1892, when it was by them resolved to issue new coupon bonds of the company to the amount of \$400,000, to run for thirty years, secured by a mortgage on all the property of the company, all the details of the making and the issuance of these bonds to be left to the discretion of its board of directors. At a meeting of the board on the 8th of July, 1892, in pursuance of the authority thus conferred, it was resolved that there should be issued four hundred bonds of the denomination of \$1,000 each, to be dated July 1, 1892, payable to bearer, in gold coin of the United States of standard fineness, thirty years after date, bearing interest at six per centum per annum, with coupons for such interest attached payable July 1st and January 1st of each successive year, and to secure these

that a trust deed conveying all of the franchises and property of the company should be executed to the Manhattan Savings Bank and Trust Company, of Memphis, as trustee; and that the trust deed should provide for foreclosure upon default in the payment of interest.

At a meeting of the board on the 30th of July, 1892, it was resolved that of this issue of bonds only \$160,000 should be immediately used, and a committee was appointed to set forth the needs of the company and to urge upon its stockholders to come to its aid by purchasing these ²⁷⁴ bonds; the balance of the issue (\$240,000) was to remain under the control of the company, to be used alone in retiring those secured by the trust deed of 1873.

The effort to sell the \$160,000 of the bonds failed, save to a limited amount, so under the authority of the board of directors those not sold were used as collateral security for the paper of the company, which, as before stated, had been used to raise money for betterments. On some of this paper Napoleon Hill, T. R. Riddick, J. W. Bailey, R. D. Frayser, and N. M. Jones, directors of the company, were accommodation indorsers, and a part was outstanding without indorsers or other security.

The notes indorsed by Hill, Riddick, and Bailey at maturity were taken up by them, and they received from the holder the bonds which had been pledged by the company for their security, or else, each taking a note for the amount of his payment from the company, at the same time received bonds as collateral. In this way Hill, on the payment of \$5,000, received \$6,000 in amount of bonds, and Riddick and Bailey each received \$3,000 par value of bonds for a payment of \$3,000 made by them respectively. These parties, as did others holding the notes of the company thus secured, in pursuance of power given in these notes, upon their maturity and nonpayment, ²⁷⁵ sold the bonds, and in each case the holder became the purchaser.

Disappointed in various efforts to relieve itself, the company finally defaulted in the payment of the interest on these bonds, and upon a demand made by some of the holders, the trustee named in the second trust deed took possession of all the properties of the company, and, after due advertisement, made public sale of the same. At this sale the holders of these bonds became the purchasers at the sum of \$125,000. Among these purchasers were Hill, Riddick, and Bailey. Soon after their purchase, the parties buying, having received a deed from the trustee, organized the New Memphis Gaslight Company, and

there was transferred to it all the properties so acquired by them.

These transactions are impeached in the several consolidated suits entitled above. The bill of Mary Rawlings is that of a stockholder of the Memphis Gaslight Company, and has for its object a cancellation of the two deeds of trust executed by that company hereinbefore mentioned, as well as the deed from the trustee, the Manhattan Savings Bank and Trust Company, to the purchasers at the trustee's sale, and the conveyance afterward made by which the property passed to the New Memphis Gaslight Company. Hunt Brothers and Miss Anne Pritchard, executrix, judgment creditors of the Memphis Gaslight Company, filed their ²⁷⁶ respective bills in the chancery court of Shelby against the same, or many of the same, defendants, as those to the bill of Mary Rawlings, seeking relief against these same conveyances on much the same grounds as are alleged in that bill. The bills of the Laclede Fire Brick Manufacturing Company and of the Christopher Simpson Architectural Iron Works were filed to enforce mechanics and materialmen's liens for work and labor done and machinery furnished to the Memphis Gaslight Company on contracts made with it before the foreclosure sale already referred to, and, as does the Rawlings bill, they assail the various conveyances and transactions hereinbefore set out, and assert liens in favor of the respective claimants on the property of that company.

The bill of Mary Rawlings was amended so as to make more specific its various charges. In this amendment it is averred that the first mortgage was void because it was not signed by the Memphis Gaslight Company nor sealed with its seal, and, further, because the company had no power, under its charter, to execute the mortgage. It was also averred that the bonds secured by this mortgage were void, because they were used to purchase the property, rights, privileges, and franchises of a competing gas company, and, further, because the bonds were tainted with usury, having been made payable in New York for the ²⁷⁷ purpose of avoiding the usury laws of the state of Tennessee.

Again, it was averred: "That said second mortgage is void for the reason that: 1. Said Memphis Gaslight Company had no power, under its charter, to execute same; 2. Because said bonds, contrary to law, and contrary to any authority in said officers to execute the same, provide for their payment in gold coin of the United States of the then weight and fineness of the same;

3. Because said company undertakes to and does mortgage its right and franchise to exist as a corporation; and 4. Because it mortgages or undertakes to mortgage its income."

Continuing, the bill alleges: "That said sale under said second mortgage is void: 1. Because said mortgage and bonds were and are void for reasons hereinbefore stated; 2. Because the description of said property in said mortgage, and of said indebtedness, is not good in law; 3. Because said pretended sale was not properly advertised, and was premature under the terms and provisions of said trust deed; 4. Because, further, no proper demand was made on the trustee to foreclose; 5. Because said trustee making said sale was the holder of a portion of said bonds for the payment of which said sale was pretendedly made; 6. Because said mortgage and bonds were void, having been executed by said Memphis Gaslight Company in the course of its business, when it ²⁷⁸ had not paid its privilege taxes; 7. Because the pretended debts of the purchasers at the trustee's sale were created at a time, if at all, when these purchasers had not paid their privilege taxes; 8. Because the said purchasers were the stockholders, directors, and officers of said company; 9. Because said sale was the result of a combination and of bad faith on the part of the parties interested in acquiring said property at a reduced price, and depriving the holders of the Memphis Gaslight Company of the same; and 10. Because fraudulent in fact and in law."

We will dispose of the controversies raised in and common to all these causes, leaving the distinctive features of the several cases for determination at the last.

It is argued that the deed of trust to Read, trustee, is inoperative, because it was not executed by the Memphis Gaslight Company, but was the act and deed of its officers. This instrument upon its face purports to be the deed of the company, but it is signed "Enoch Ensley, President," and countersigned "Geo. W. Gift, Secretary"; it, however, has the seal of the corporation attached. While thus signed, following the conveying terms of the deed the clause in testimonium is as follows: "In witness whereof, the said Memphis Gaslight Company has caused its corporate seal to be attached hereto, and caused this deed to be signed by Enoch Ensley, its president, and to be ²⁷⁹ countersigned by Geo. W. Gift, its secretary, and it is also signed by S. P. Read, the trustee. This the first day of April, 1873."

This instrument meets the common-law requirement, inasmuch as it is authenticated by having affixed to it the corporate

seal, and also the requirement of the statute of 1841-42, section 1, carried into Shannon's Code at section 3679, which is in these words: "Instruments in relation to real or personal property, executed by an agent or attorney, may be signed by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed."

Again, it is urged this deed of trust is void because of the following clause: "But it is hereby expressly stipulated and expressed that nothing herein shall operate to prevent the party of the first part from using or expending its money and assets in extending its forks or from selling or exchanging, when deemed expedient for the increase and benefit of its business, its town lots, buildings, manufactories, and machinery, the security of the bonds not to be lessened thereby."

The insistence is that this is, in effect, a reservation of such power of control and disposition of the property conveyed as to render nugatory ²⁸⁰ the security of the instrument. The trust deed does not include the money of the gas company, and there is, therefore, no inconsistency in the mortgagor reserving the right to expend it in extending its work. Nor is the instrument any more affected by the addition of the words "and assets," as it is evident the draughtsman had in his mind personal assets of a kindred nature with "money"; however, no personal property is embraced in its conveying clause. Thus the only question is, Does the reserved right to the mortgagor of selling or exchanging the property covered by the conveyance when "deemed expedient" vitiate the instrument. We think this question is answered by the case of *Frierson v. Blanton*, 1 Baxt. 272. This power to sell or exchange during the running of the mortgage did not involve the power to convey; that was alone in the trustee, and this could only be done by him when the security of the bonds protected by the mortgage was not lessened. So, at the last, the power of control was left with him, and not with the mortgagor. This construction of the instrument is natural, and in giving it we are only recognizing the well-settled rule that it is the duty of the courts to construe instruments so as to give them operative effect rather than to destroy them: *Morley v. Power*, 10 Lea, 219; *Frierson v. Blanton*, 1 Baxt. 272. We therefore think there is nothing in this contention.

²⁸¹ As to the averments in the bill that the bonds secured by the Read mortgage were void, because ultra vires, in that they were issued to buy up a competing gas plant, and that they were made payable in New York in order to avoid the usury laws of this state, there is no evidence to support either, and they may be dismissed from further consideration.

We come now to a discussion of the trust deed to the Manhattan Trust and Banking Company, and the various steps taken prior and subsequent to its foreclosure, all of which are made subjects of serious attack by the complainants in their several bills.

We do not understand any question is made upon the power of the company to execute this instrument, or as to the formality of its execution; rather, the controversy is over the dispositions of certain of the bonds secured by it, and the foreclosure sale made under it with the incidents both preceding and subsequent to the sale.

In the first place, it is said that of the bonds secured by this deed only nineteen fell into the hands of bona fide holders. This is a mistake of fact and of law. It is true only that number were sold by the corporation, but the remaining \$141,000 of the \$160,000 were used by it to secure loans made to the company at the time of and on the faith of their pledge, or else to secure pre-existing debts either upon renewal or ²⁸² otherwise. The Continental National Bank and the Memphis City Bank each advanced money to the company upon the security of these bonds. These banks, no less than the purchasers of the nineteen bonds, were, on this record as to these bonds, holders for value in due course of trade, in the strictest sense. This is also true as to Riddick. He was one of the indorsers of the company's note for \$10,000 made to the First National Bank. Being unwilling to renew the paper, the bank agreed to discharge him, and did do so, on his paying \$3,000 on this note. Thereupon the company executed to him its note for that sum, and pledged three bonds of \$1,000 each as collateral. This made him a bona fide holder for value within the ruling of *Atlanta Guano Co. v. Hunt*, 100 Tenn. 89, 42 S. W. 482. While it is true the parties taking bonds as collateral security for pre-existing debts, under the rule then prevailing in this state, were not holders for value in due course of trade, yet it being clear that the debts they were given to secure were honest debts of the company, created by it in making the very improvements the bonds were issued to pay for, the creditors

receiving them as security were bona fide holders, and as such entitled to full protection save as against such equities as might be inherent in the bonds.

But it is said the directors of the company had no power other than to sell these bonds after issuance, and that the act of pledging was therefore ²⁸³ ultra vires and void. This assumption is unwarranted in fact. The stockholders' meeting of June 30, 1892, authorized the issuance of these bonds to the amount of \$400,000, and the execution of a mortgage to secure them, in view of a floating debt of about \$135,000 contracted for extensions and improvements already made, and about \$25,000 of improvements still required, and of the approaching maturity of the \$240,000 bonds covered by the Read mortgage. This meeting, by special resolution, approved the improvements made and contemplated, and also the retiring of the Read bonds, but did not direct the sale of the new bonds for any purpose. On the contrary, it resolved "that when said bonds shall be ready for use, . . . they shall be subject to the control of the board of directors of this company, to be used by said board in its discretion and judgment for the purposes in these resolutions specified."

At a meeting of the board on the 30th of July following, it was determined that of this issue of new bonds \$240,000 should be placed in the custody of the Manhattan Savings Bank and Trust Company subject to the further order of the board, and that the president of the company should use the remaining \$160,000 of bonds as collateral security for moneys advanced or to be advanced to the company by the First National Bank, or to protect the indorsers of the paper of the company made for such advancements. At ²⁸⁴ the same meeting a committee was appointed to effectuate a sale, if possible, of these bonds at par. At the time of the passage of this resolution the only indorsers of the company's paper were four of its directors, to wit, Jones, Riddick, Bailey, and Hill, and it is evident this action contemplated security for them as well as for the holders of the paper. But we think the assumption equally unsound in law. The act of pledging the bonds to secure an advance of moneys for the use of the company, as in cases of the Continental National Bank and Memphis City Bank, or to quiet its pre-existing creditors, or to secure its accommodation indorsers, was not an act ultra vires: *Baxter v. Washburn*, 8 Lea, 15; *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006.

But it is said that the directors were disqualified from voting to apply bonds to secure debts upon which they were liable, or which were held by corporations in which they were interested. At the meeting of the board in July, when the disposition of these bonds was decided, there were present and voting five directors, to wit, Jones, Hill, Frayser, Bailey, and Nathan. Of these Jones was president of the First National Bank, which then held a large amount of the paper of the company, and Nathan was cashier of the Manhattan Savings and Trust Company, which was also a creditor, and all were indorsers of notes given by the company.

²⁸⁵ It is to be remembered that the stockholders, at their meeting on the 30th of June, 1892, were advised fully of the floating debt of the corporation, and the necessity of adding at least \$25,000 to it, in order to make other improvements, and voted the issue of new bonds primarily to provide for this debt and these further needed improvements, but instead of directing a sale of the excess of these bonds over \$240,000, placed them under the control of the board of directors, to be used by them as in their judgment might seem best. Clothed with this broad power it would require a case at least of more than an exercise of mistaken discretion in their disposition to impeach their action.

In addition we are aware of no principle, and certainly our attention has been called to no authority, which precludes a director of one corporation from voting or otherwise seeking in a legitimate way security for an honest debt due from that corporation to another of which he happens to be an officer.

Again, it is well settled that a director is not forbidden, by reason of his position, from dealing with the corporation, and it often serves a wise purpose that he should lend it his personal credit in carrying on its operations. This being so, why should he not be permitted, from a going concern continuing and expecting to continue business, to ²⁸⁶ secure indemnity against possible loss from accommodation indorsements he has made for it?

In *Sanford Fork etc. Co. v. Howe*, 157 U. S. 312, 15 Sup. Ct. Rep. 621, a mortgage was made by a corporation, a going concern, then engaged and in good faith expecting to continue in business, to secure its directors as accommodation indorsers of its paper. In answer to the argument that these parties were directors, and had no right to secure themselves, the court, speaking through Brewer, J., said: "For here the corporation,

although insolvent within the rule which declares that insolvency exists when the debtor has not property sufficient to pay his debts, was still a going concern, and intended to continue its business, and the mortgage was executed not simply to secure directors and stockholders for past indebtedness, but to induce them to procure a renewal or extension of the paper of the company then maturing, or about to mature, and also to obtain further advances of credit.

"Will it be doubted that if this mortgage had been given directly to the holders of these notes, it would have been valid? Are creditors who are neither directors or stockholders, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, ²⁸⁷ as a matter of law, such creditors be content to share equally with other creditors of the corporation because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything?"

It is to be observed in the present case the bonds were not pledged originally to those directors, but to the First National Bank, which had advanced to the corporation large sums of money upon its notes, upon a portion of which they were indorsers. As has been stated, this money, as well as that secured from other sources hereinbefore indicated, was used to pay for improvements conceded by the stockholders to be essential to the proper operation of the company. These parties pledging their individual credit, in order to strengthen that of the corporation, were under no obligation to do so. They derived no benefit from the expenditures and improvements thus made that was not common to all stockholders alike. It is, we think, clear on this record that when they indorsed this paper, as well as when they voted authority to pledge the bonds as security, they honestly believed, and had the right to believe, that they were pursuing a policy likely to accomplish the best results for the company.

It is true that the resolution of the board was that the president of the company should pledge the bonds to secure the payment of its paper or ²⁸⁸ to protect the indorsers, and that twelve of the bonds passed ultimately into the hands of those indorsers, to wit, six to Napoleon Hill, and three each to Riddick and Bailey, on account of payments made by them as such indorsers. It, however, is immaterial whether they came

by them upon a pledge made direct by the company or from the bank, which, upon receiving payment of the notes they were on, turned over to them its collaterals. They were entitled to them if the transaction from which they came will bear the scrutiny of the court.

In *Duncomb v. New York etc. R. R. Co.*, 84 N. Y. 190, and upon a second appeal in 88 N. Y. 1, referred to approvingly in *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136, 31 S. W. 1006, it was held a pledge of bonds was valid when ordered by the executive committee of the directory, which committee was composed of three persons, one being the pledgee and the two others indorsers on some of the paper which the bonds were pledged to secure. Upon this state of facts the court said: "The claim that Rucker acquired no title to the bonds, for the reason that he obtained them by the votes of two of the directors while they were personally liable as guarantors for a part of the obligation for which security was given, we think cannot be upheld. The debt was due to Rucker by the company, and the money was not advanced or loaned to Meade and Duncomb, and ²⁸⁹ their guaranty was that of individuals, and not as officers of the company. They were under no personal obligation originally to pay the debt, and no reason is apparent why they were not justified in placing the matter in a position where the company should pay its debt and relieve them": See, also, *Foster v. Belcher's Sugar Refining Co.*, 118 Mo. 238, 24 S. W. 63.

It is true all such transactions will invite the closest investigation by the courts, if brought in question, and must be shown to be characterized by the utmost good faith (3 *Thompson on Corporations*, sec. 4059; *Addison v. Lewis*, 75 Va. 701), but when found to be free from all suspicion of unfairness, they will be maintained. There are cases to the contrary, but we think the weight of authority, as well as considerations of policy, sustain such a transaction: *Gould v. Little Rock etc. Ry. Co.*, 52 Fed. 685; *Rockford etc. Grocery Co. v. Standard Grocery etc. Co.*, 175 Ill. 89, 67 Am. St. Rep. 205, 51 N. E. 642; *Brown v. Grand Rapids etc. Co.*, 58 Fed. 286.

It is again urged against these pledges of bonds that they were made at a time when the insolvency of the corporation had converted its assets into a trust fund for the payment of all creditors. This objection is made outside the pleadings. In the bills of *Pritchett, Christopher, and Simpson and Hunt Brothers* the insolvency of the corporation at the time of the

pledges is not alluded ²⁰⁰ to. In the bill of the Laclede Brick Company the charge is that at the time of the execution of the second mortgage the property conveyed was worth \$800,000, and that, upon a pretended default in the payment of interest on the bonds secured by that mortgage, through the machinations of their holders, it was foreclosed, and the purchasers were enabled to get property worth at least \$640,000, free from burden, for the sum of \$125,000, thus negating the idea of insolvency. This leaves the Rawlings bill for examination on this point.

It places a still higher valuation on the company's property. In paragraph 23 of the amended bill we find this charge: "The said property so sold at said sale as aforesaid [referring to the trustee's sale of April 2, 1894] was at that time, and is now, worth more than \$1,000,000, and was bid off at a totally inadequate price, and upon this ground, if upon no other, the said sale should be set aside."

In paragraph 56 complainant charges: "Your oratrix further shows to the honorable court that in the fall of 1892 the property account of the Memphis Gaslight Company, made up, approved, and published by said officers, fixed the total value of its taxable property at \$788,256.88, saying nothing of the rights, privileges, and franchises from and in the city of Memphis, a city of more than 75,000 population, worth at least ²⁰¹ \$75,000. Your oratrix further shows to this honorable court that after the making of said property account there was \$150,000 expended in improvements, betterments, and extensions of its property, etc., making said property worth at the time it was pretendedly sold for \$125,000 not less than \$1,000,000."

Again, in paragraph 88 of the amended bill are found the following equivocal statements: "Oratrix further shows to the honorable court that if said Memphis Gaslight Company was insolvent at the time said bonds were hypothecated to secure said pre-existing debts, . . . of which she is not sufficiently advised to speak one way or the other," etc.; and also in paragraph 96 this language: "Oratrix further shows that . . . if it be determined . . . that said company is insolvent, then this bill should be declared a general creditor's bill," etc.

The only approach to an averment of insolvency of the corporation at the time of the pledges is found in the prayer where the court is asked to declare the hypothecation of the bonds illegal on many grounds, and among others this: "Because said company had no power to preferentially secure said debts, if

valid and just, to the exclusion of other creditors or stockholders, at a time when said Memphis Gaslight Company was insolvent."

It will be seen this last statement is a conclusion ²⁹² of law, rather than an affirmation of a fact. On such pleadings we think defendants would have been relieved of entering upon proof as to the condition of the corporation at the time of these pledges, save as it might bear on the question of the good faith of its then officers and managers. But such evidence is in the record, and abundantly sustains the contention of defendants that the company was solvent at the time of the issue and pledge of these bonds, and was then and would have continued a going concern but for untoward circumstances over which the directors had no control. This being so, there is no room for the application of the trust fund doctrine announced in *Morrow v. Bank of West Tennessee*, 4 Cold. 471; *Moseby v. Williamson*, 5 Heisk. 278; *Comfort v. McTeer*, 7 Lea, 660; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943, 32 S. W. 1097; *McClaren v. Roller Mill Co.*, 95 Tenn. 696, 35 S. W. 88; *Memphis Barrel etc. Co. v. Ward*, 99 Tenn. 172, 63 Am. St. Rep. 825, 42 S. W. 13.

But it is said the directors, who were on certain of the paper of the company, co-operating with one or two favored stockholders, deliberately brought about the foreclosure of the secured mortgage, when, joining with others, they purchased the valuable property of the corporation for a trifle.

This objection leads to a consideration of the history of the corporation from the time of the determination of the stockholders to issue a new ²⁹³ series of bonds until, for the default in the payment of interest, the foreclosure sale took place.

As has already been stated, the new bonds were authorized in part, if possible, to retire an earlier series, and more than all else to provide means to discharge a large floating debt created for betterments already made, and to pay for others that were required. This was in the summer of 1892. At that time a large part of this debt was carried by the First National Bank of Memphis in the shape of notes executed by the gas company. One of these notes for \$10,000 had on it as accommodation indorsers Jones, Riddick, Bailey, and Nathan; one for \$5,000 was indorsed by Napoleon Hill and another for the same amount by R. D. Frayser. The balance of the paper, amounting to about \$50,000, was unindorsed. The entire debt, secured and unsecured, amounted to about \$135,000. It was

supposed at the time the bonds were authorized that there would be no difficulty in selling \$160,000 of the issue. While it is evident the business of the company had been interfered with by the competition of a rival gas company, yet the parties interested believed, with the introduction, as had been done, of modern appliances for the making and distribution of gas, the corporation was in a condition to furnish it in a satisfactory manner to its customers, and profitably to itself. We are satisfied at that time there was not in the minds of the directors either ²⁹⁴ anticipation of insolvency or of a cessation of business. The committee appointed to dispose of these bonds, however, in 1892, had reported the highest price then obtainable for them was ninety cents. This offer was declined, as they were considered worth par. Afterward, in 1893, one Underwood, an agent of certain eastern capitalists, appeared at Memphis, and after a careful examination made a proposition to purchase both gas companies in that city; this offer was acceptable to the stockholders of the Memphis Gaslight Company residing in Memphis, but was not so to those in Nashville, and therefore came to naught.

In the early part of the spring of 1893 the country began to feel the first shock of the financial panic of that year. This reached its crisis in the summer or fall of 1893. So widespread and disastrous was this that it prostrated business enterprises which until then were regarded as most stable, destroyed or reduced values, and created such general distrust that the very best securities often failed to draw money from its hiding places. It was in the midst of this panic that the First National Bank, holding the notes of the company secured alone by its bonds, called for their payment. Failing in this demand, the bank sold the bonds held by it as collateral under the authority given in their notes, and bought them in at the sale. In addition, in the cases of Hill and Bailey, they were required to take up the notes that they ²⁹⁵ were indorsers on, and when they did this the bonds pledged by the company as security were turned over to them. Riddick had already relieved himself by a payment from the note he had indorsed. The company, unable to reimburse these gentlemen, gave to them notes for the sums thus paid, secured by these bonds. Afterward, by sales properly made, these three parties who had loaned their credit to the company became the owners of the bonds pledged for their security.

At this time it became evident the company, if not in extremis, was rapidly approaching that condition. Several efforts had from time to time been made to avert the final catastrophe. It had before this been determined, if possible, to distribute the burden of carrying the \$165,000 bonds among all the stockholders. This was after an abortive attempt to sell in the open market. The Memphis parties, including those whose good faith is fiercely assailed in these suits, believing the investment safe, but the disposition of the bonds essential, agreed to apportion among themselves \$110,000 of these bonds at par. Large blocks of the Memphis Gaslight Company stock were held in Nashville, and the holders of this stock were urged, but declined, to take the remaining \$50,000. One of the directors, to wit, Mr. Riddick, made a special trip to Nashville, and in personal interviews urged upon those stockholders the propriety and necessity of their taking their due proportion ²⁹⁶ of bonds, and thus aiding in tiding the company over to a more prosperous season. In addition, under the order of the board of directors, a circular letter, giving a detailed account of the condition of the corporation had been sent to the stockholders, and each was asked to come to its relief by becoming a purchaser of one or more of these bonds. We are satisfied that all were advised that unless such aid was given that those who had sustained the company up to that time, through the disastrous financial panic of 1893, would give up further endeavor and abandon the property to its fate under the second mortgage. Failing to secure relief, this was accordingly done, and then it was, under a written demand made by certain of the bondholders upon the trustee, it took possession of the property preliminary to a foreclosure of the mortgage. The bondholders making this demand, and the amount of bonds held by each, are set out as follows:

First National Bank	\$ 67,000
Pittsburg Coal Company	21,000
W. H. Brown & Sons	8,000
German Bank of Memphis	9,000
The Continental Bank	18,000
Memphis City Bank	7,000
Total	\$130,000

It will thus be seen that neither Nathan, Hill, Riddick, nor Bailey joined in this demand, nor ²⁹⁷ are we able to discover

that they stimulated it, or in any way confederated with others with a view to bringing it about, in order that they might share in any ultimate benefits resulting from the sale. The record, after a critical examination, fails to disclose on their part any evidence of bad faith, either toward creditors or stockholders, but, on the other hand, does show, as we think, an earnest and persistent effort to save the company from wreckage.

It is true its property was sold by the trustee to the purchasers at the sum of \$125,000, and that Hill, Riddick, and Bailey were three of these purchasers, the holders of the other bonds constituting the remainder. But this sale was a public one, made after due advertisement, without any attempt, so far as we can see, to stifle biddings, and the property was still subject to the Read mortgage for \$240,000. In addition, the sale took place in the early part of 1894, before the country had felt the first movement of financial recovery, and when capital was still unwilling to seek investment.

It is further worthy of note, as going to the good faith of the purchasers, that having transferred the property so acquired to the New Memphis Gaslight Company, it operated the plant for almost eighteen months, and then closed it out to the rival company for \$180,000, subject to the Read mortgage. ²⁹⁸ The only one of the three directors participating in the purchase at the trustee's sale, and afterward in the proceeds of this sale, who is a defendant to the Rawlings bill, is Mr. Bailey, and the record shows that in December, 1895, out of the proceeds he received only the sum of \$3,375 for the payment of \$3,000 made by him for the company prior to September, 1893.

Again, it is said there was no default in the payment of the interest on these bonds, and on that account the trustee's sale was unauthorized.

The language in the third section of this Manhattan mortgage, authorizing the trustee to declare the bonds matured in the event of default in the payment of interest, reads thus: "In case the party of the first part, its successors or assigns, shall fail to pay the installments of the semi-annual interest on any of the said bonds, when the same may become due and payable according to the tenor thereof, or any coupon attached thereto, and shall continue in such default for sixty days after such installments have been demanded at the office of the party of the first part, or the National Park Bank, of New York, . . . then and thereupon the principal of all the outstanding bonds hereby intended to be secured shall, at the option of the trustee,

become and be immediately due and payable, provided the trustee gives written notice to the party of the first part, its successors or assigns, while such default ²⁰⁰ continues, of his option to that effect, which notice the trustee may give of his own motion if he sees fit, and shall be bound to give, if requested, in writing by the holder or holders of \$100,000 in amount of all the bonds outstanding."

The record shows that none of the coupons on these bonds maturing January, 1893, except on ten bonds owned by one Williamson, were paid, and none of the July coupons without exception. Omitting the bonds pledged as collaterals and afterward sold, there were at least nine of the bonds which had been sold by the company for cash, on which there was a default for the January, 1893, coupons, and upon the whole nineteen for the July coupons, and there was no reason why, upon this default, if there had been no other, the trustee should not have exercised his option and declared the whole issue of bonds due and payable.

But that demand was made on the company at its office for the payment of the due coupons largely in excess of these nineteen is shown by uncontroverted evidence. The default and demand are shown with equal clearness. It is unnecessary to set it out in detail; it is to be found in the testimony of the company's officers, as well as of those who made the demand.

By the clause set out above the default began with the failure to pay the coupons when mature, ³⁰⁰ but the right to declare the whole issue due and payable did not accrue unless this default continued for sixty days after the demand. The testimony is uncontradicted that on October 3, 1893, a number of the holders of these bonds made demand for the payment of their due coupons, and that on December 4, 1893, upon the request, in writing, of the holders of more than \$100,000 in amount of the bonds, the trustee gave written notice to the company that it declared all the bonds secured by the second mortgage due and payable, and thereupon took possession of its property, and after due advertisement made a public sale of it, as hereinbefore is set out.

But it is said that if the trustee had not diverted the income of the plant, while in its possession, to the payment of the coupons maturing on the first or Read mortgage, there would have been no occasion for a sale under the second mortgage. The payment of these coupons was proper; the Read mortgage was prior in point of time and right, and the trustee,

to save possession to itself and its successor in title, was obliged to pay these coupons. It is also insisted that the record, independent of this payment, shows that the trustee received a sufficiency of income while in possession which, if properly appropriated, would have averted the foreclosure sale. We have examined the record on this point, and it must ³⁰¹ suffice for us to say we do not agree with appellants in their contention.

It is also said that the three directors, who had acquired the bonds of the company by reason of their accommodation indorsement of its paper, had no right to purchase at the trustee's sale. On this point there is some conflict of authority, but when it is once determined that a director may lend his credit in good faith to the corporation to enable it to carry on its legitimate business, and take as indemnity to secure himself from personal loss its bonds, it seems to follow, necessarily, that he acquires the right, as any other mortgagee, to protect himself even to the extent of being a purchaser at a foreclosure sale, which has become inevitable through no fault or design of his: *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316. But should it be conceded that we are wrong in this conclusion, yet it would not avail complainants, because in the absence of evidence of a conspiracy to wrongfully bring about the sale between these directors and their copurchasers, who sustained no fiduciary relations either to the stockholders or the creditors of the corporation, and who, so far as we can see, acted in good faith, the title acquired at the foreclosure sale could not be avoided. In such case the rule laid down in *Jackson v. Ludeling*, 21 Wall. 616, does not apply. The most that complainants could obtain ³⁰² would be to hold these directors liable for the profits derived by them from the ultimate sale of the property; but their bills are not framed on this theory, nor do they ask such relief. In addition, Hill and Riddick are not made defendants to the only bill (that of Mrs. Rawlings) under which, even upon proper amendments, such relief was possible.

This disposes of the main contentions raised by the Rawlings bill, but more or less cognate to all the bills. There remains, however, of the consolidated causes the mechanic's lien cases, and the only distinct question presented by them is, Are their liens superior to the rights of the purchasers under the mortgage? The contract of the Laclede Fire Brick Company antedated the mortgage, but no material was delivered until af-

ter the registration of the mortgage. The rule is, the title of the purchaser relates back to the time the mortgage became effectual (*Baxter v. Washburn*, 8 Lea, 15; 5 *Thompson on Corporations*, secs. 6257, 6258), while the lien of the materialman begins when his first material is placed on the property, on which the lien is asserted: *Electric Light Co. v. Gas Co.*, 99 Tenn. 387, 42 S. W. 19; *Green v. Williams*, 92 Tenn. 224, 21 S. W. 520.

The contract of the Christopher Simpson Architectural Works was made and the materials furnished after the registration of the mortgage. In both cases the contract was made with the mortgagor, ³⁰³ and no notice of it was given to the mortgagee.

After a careful examination of these voluminous records we are satisfied the chancellor reached a right conclusion in the dismissal of these bills.

There remains open only one question, and that is made on the appeal of Read, trustee. He was made a party defendant to all these bills, and in each one the deed of trust in which he was named trustee was assailed. He answered the bills denying the averments made against this deed. He also filed a cross-bill asking that the trust deed be declared a valid security for the payment of the bonds secured therein. This cross-bill was dismissed, and he complains of this as error.

We think the cross-bill was properly dismissed. It was not filed as a bill quia timet, and there was no occasion for its being so filed. The only parties questioning the integrity of this instrument were the respective complainants filing these bills, and a complete vindication of it could be obtained by their dismissal on answer and proof. A decree on the cross-bill would have bound none others than the parties to the suit, and it would be *res adjudicata* as to them on the pleadings as they were. This also disposes of the application of his learned solicitor to have a lien declared for compensation for his professional services rendered the trustee. That the trustee was under legal obligation to protect this trust deed, assailed ³⁰⁴ as it was, and that he was authorized to employ a lawyer to this end, we think clear; and that the gentleman so engaged has rendered valuable service to his client is equally clear. But the fixing of the fee and the security for its payment must be between the two. There is no fund under the control of the court upon which it could fix a lien, and no adverse parties against whom a decree in his favor could be rendered. To grant a lien or determine the amount due for the solicitor's

service in these cases would be brutum fulmen. We have examined, as far as they have been available to us, the authorities relied on for this application, but none in our opinion support it.

The decree of the chancellor is in all things affirmed. The costs of the lower court are left as adjudged by him; the costs of the appeal will be paid by the complainants in these several causes and S. P. Read, trustee.

CORPORATION—OFFICERS DEALING WITH.—A director of a solvent corporation may deal with it, loan it money, and take security therefor, in like manner as a stranger. In such case the subsequent insolvency of the corporation will not affect his right to recover his loan or enforce his security: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Schufeldt v. Smith*, 131 Mo. 280, 52 Am. St. Rep. 628, 31 S. W. 1039. See, too, *Millsaps v. Chapman*, 76 Miss. 942, 71 Am. St. Rep. 547, 26 South. 369. Contracts made by a corporation with its officers are not void per se, though they will be closely scrutinized, and set aside if not made in the utmost good faith: *Singer v. Salt Lake etc. Co.*, 17 Utah, 143, 70 Am. St. Rep. 773, 53 Pac. 1024.

CORPORATION—OFFICERS AS PREFERRED CREDITORS.—The property of an insolvent corporation is a trust fund in such a sense as to preclude its directors and officers dealing with it, so as to secure preference to themselves: See the monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78; *Adams v. Deyette*, 8 S. Dak. 119, 59 Am. St. Rep. 751, 65 N. W. 471; note to *Conover v. Hull*, 45 Am. St. Rep. 835. But if security is given to a director when the corporation is solvent, its subsequent insolvency cannot act retroactively to defeat the security or preclude him from making it effective: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640. See, too, *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810; *Butler v. Harrison Land etc. Co.*, 139 Mo. 467, 61 Am. St. Rep. 464, 41 S. W. 234; *Campbell etc. Mfg. Co. v. Marder*, 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841, 70 N. W. 51.

COLLATERAL SECURITY—BONA FIDE HOLDER.—Whether the holder of collateral securities can be ranked as a bona fide purchaser is considered in the monographic note to *Griggs v. Day*, 32 Am. St. Rep. 712-715.

MECHANIC'S LIEN—PRIORITY OF MORTGAGE.—To give a materialman's lien priority over a mortgagee's lien, he must show that his material was on the premises, or that he had commenced labor on the premises prior to the record of the mortgage: *Farmers' Bank v. Winslow*, 3 Minn. 86, 74 Am. Dec. 740. A mechanic's lien attaches from the delivery of the material, or upon the performance of the work, and not from the date of the contract: *Williams v. Chapman*, 17 Ill. 423, 65 Am. Dec. 669. It is not superior to the lien of a mortgagee executed prior to but recorded after the construction of the building is commenced: *Mathwig v. Mann*, 96 Wis. 213, 65 Am. St. Rep. 47, 71 N. W. 105.

LIENS OF ATTORNEYS are considered in the monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 251-281

KNOXVILLE v. HARTH.

[105 Tenn. 436, 58 S. W. 650.]

MUNICIPAL CORPORATIONS—LIABILITY TO PROPERTY OWNERS FOR GRADING OF STREETS BY THIRD PERSONS.—A municipal corporation cannot devest itself of its duty to superintend and control all improvements made by its agents, servants, and contractors; hence, a municipality which permits a third person to grade its streets, and receives and uses such work after it is done, is liable for any damage caused to abutting property owners by reason of a change of grade, whether such grading was legally authorized or merely permitted to be done.

R. L. Cates, for Knoxville.

Sansom, Welcker & Parker, for the defendants.

⁴³⁶ WILKES, J. These are actions against the city by citizens and property owners for damages to ⁴³⁷ their property, which abuts on Cleveland street in the city.

It appears that one Lawson Irwin, a contractor, was employed by the trustees of Grey Cemetery to make some improvements on its property, which required the use of a large quantity of earth. He saw Mr. John J. Littleton, chairman, and John Hudiburg, associate member of the board of public works, and from them obtained permission to get the earth from Cleveland street by grading it. The chairman directed the city engineer to establish a grade for the street, and he proceeded to do so, setting stakes for the guidance of Irwin. The city did not employ or pay Irwin for the work, but simply permitted him to get the earth from the street under the guidance of its engineer. The street had not been previously graded, and there was no action of the board directing it to be done nor establishing the grade, and no ordinance passed. The only authority for the work on the street was the permission given by Littleton and Hudiburg as individuals, and not as a board.

Plaintiffs' property abutted on this street, and their ingress and egress was seriously injured by the grading, and their property was thereby depreciated materially in value. The trial judge, hearing the case without a jury, gave judgment for plaintiff Harth for two hundred and twenty-five dollars, and in favor of plaintiffs Galbraith & Maloney for seventy-five dollars, and the ⁴³⁸ city has appealed. The counsel for the city makes no complaint of the amount awarded, and does not question the fact that damage was done, but the contention is that the work was not done by the city, nor primarily for its benefit;

that the work was not authorized to be done by the city, but was done simply by permission of two of the three members of the board of public works as individuals, and not in any board or official capacity, and under this state of facts the city would not be liable.

The charter of the city provides that the board of public works shall have the exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving all streets, alleys, etc., and to fix and establish the grade of all streets, alleys, avenues, and thoroughfares. If this street had been changed from the natural or a previously established grade by a valid act or ordinance of the city, it is conceded that under the act of 1891, chapter 31, as amended by the act of 1893, chapter 41 (Shannon's Code, sec. 1988), the city would have been liable for damages to the property of abutting owners, but it is insisted that the changing in this grade was not the act of the city, and it cannot be held liable therefor. On the other hand, it is insisted that the city is liable for such damages, resulting from a change of grade, whether such grading was legally authorized or merely permitted to be done. The ⁴³⁰ language of the act is broad enough to cover such grading, no matter by whom done, as the language does not refer to grading done by the city, but in general, and would embrace grading done by any other person. The courts give a liberal construction to such acts in favor of the citizen when the work is for the benefit of the general public: *Mayor etc. v. Nichol*, 3 Baxt. 338.

That this grading was a benefit to the city cannot be questioned, and while the city neither authorized nor ratified the act in any official manner, it did permit the street to be torn up and graded, to the injury of the plaintiffs and for its own benefit. A municipal corporation is the proprietor of its streets, which it holds in trust for the benefit of the corporation. The city must superintend, control and regulate its streets, and it must so enforce measures of vigilance and care over them as not to cause or allow damage to others by their condition: *Nashville v. Brown*, 9 Heisk. 2, 24 Am. Rep. 289.

It cannot divest itself of its duty to superintend and control all improvements and repairs made by its agents, servants, and contractors: *Memphis v. Lasser*, 9 Humph. 760; *Knoxville v. Bell*, 12 Lea, 159.

Neither can it turn over to a third person the grading and control of one of its streets and escape responsibility for his act, which it permits and from which it receives benefit. If the

city ⁴⁴⁰ permitted this work to be done, and received and used it after it was done, it would be liable on that ground; if it was a tortious act done by the sanction or permission of the corporation, it would be liable on that ground: 2 Dillon on Municipal Corporations, 4th ed., sec. 710.

We are of opinion there is no error in the judgments of the court below, and they are affirmed with costs.

STREETS, CHANGE OF GRADE.—THE LIABILITY OF CITIES for changes in the grade of streets is the subject of the monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835-850. Where a grade is changed by a street railway company under authority from the municipality, granting such authority does not render the municipality liable for the action of the railway: *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859, 26 S. E. 266.

MAPLES v. RAWLINS.

[105 Tenn. 457, 58 S. W. 644.]

HOMESTEAD—JUDGMENT LIEN—PRIORITY.—Where the head of a family, against whom exists a judgment of a court of record, purchases land, his homestead right attaches at the same time the lien of the judgment does, but is superior to it.

HOMESTEAD—FRAUD ON CREDITORS—WIFE'S MONEY. The purchase of land as a homestead by a debtor, with money furnished by his wife and sons, is not a fraud upon his creditors.

Welcker & Parker, for Maples.

Green & Shields and A. C. Grimm, for Rawlins.

⁴⁵⁷ **WILKES, J.** The question in this case is one of homestead. Rawlins recovered judgment against Maples June 30, 1898; Maples bought the real ⁴⁵⁸ estate in controversy December 19, 1898. On the same day that he bought it and had it conveyed to himself, but at a later hour, he mortgaged it back to Ward, from whom he got it, to secure him the balance of purchase money. Rawlins had the property levied on, and complainant filed this bill against him and the sheriff to have his right to homestead declared. The chancellor decreed that complainant was entitled to a homestead exemption, but that defendant had a right to have the property sold subject to the homestead. Defendant appealed and assigned errors.

Complainant is the head of a family. The insistence of defendant is that his judgment lien, which was in a court of rec-

ord, fastened itself upon the property as soon as the title vested in the complainant, and was superior to the homestead right. It is also insisted that the money invested in this homestead was subject to complainant's debts, and could not be invested in a homestead that would be free from such debts.

In *Hollands v. Webb*, 2 Shannon Tenn. Cas. 582, it was held that property subject to execution could not be converted into a homestead for the purpose and with the intent to defeat creditors of their debts, but that if a debtor had money on hand he might convert it into a homestead. Money in the hands of a debtor is not subject to be seized under execution. If it came to the hands of an officer who has an execution in his hands against ⁴⁵⁹ the owner, it may be applied to such execution: *Dolbey v. Mullens*, 3 Humph. 437, 39 Am. Dec. 180.

So if it be in the hands of a third person that person may be garnished. In the present case, however, the court of chancery appeals report that the money invested in this land was not that of the debtor, but was furnished by the wife and sons. A creditor cannot complain of the sale and conveyance of personal property not liable to execution in the hands of his debtor: *Wagner v. Smith*, 13 Lea, 569.

There can be no question of fraud in the case under the finding of the court of chancery appeals.

In *McCrae v. McCrae*, 103 Tenn. 719, 54 S. W. 979, it was held that when a widower with minor children made a will in which he directed that his land be sold for his debts that the homestead right of the minors was superior to that of the creditors provided for in the will, that the right to homestead in the minor children attached immediately on the father's death, and took effect simultaneously with the will, and in such case the courts, in enforcing the spirit of the constitution, would give the homestead priority.

A similar principle applies to this case, and the homestead right attached at the same time the lien of judgment did, but is superior to it. The decree of the court of chancery appeals is affirmed.

HOMESTEAD.—JUDGMENTS EXISTING against a purchaser of land for occupation as a homestead do not, in some of the states, constitute liens thereon, if the debtor pursues the purpose of occupying it as a homestead within a reasonable time: See the monographic note to *Vanstory v. Thornton*, 34 Am. St. Rep. 502. Compare the monographic note to *Mertz v. Berry*, 45 Am. St. Rep. 384.

WOODRUFF v. ROYSDEN.

[105 Tenn. 491, 58 S. W. 1066.]

ADVERSE POSSESSION OF FATHER FOR SON.—Adverse possession of land by a father and his minor son for a period of more than seven years, under a deed which purports to convey title to the son, invests the son with title.

ADVERSE POSSESSION BY ONE TENANT IN COMMON, WHEN BENEFITS ALL.—Where several tenants in common claim under deeds purporting to convey to them the fee in the land, adverse possession by one, who does not claim to hold exclusively for himself, for a period of more than seven years, inures to the benefit of his cotenants, and will exclude all adversary constructive possession in another having the legal title to the land.

ADVERSE POSSESSION.—SUCCESSIVE ADVERSE POSSESSIONS OF TWO DIFFERENT TENANTS IN COMMON may be joined together and inure to the benefit of a tenant in common not in possession, where the cotenants claim under color of title and not as naked trespassers.

ADVERSE POSSESSION—INTERRUPTING.—SUIT BROUGHT AGAINST A GRANTOR who does not claim to own the land, and is not in possession, does not interrupt the continuity of adverse possession of the grantee who is the true owner and in possession of the property.

Norman B. Morrell and Lucky, Sanford & Fowler, for Woodruff.

Templeton & Carlock, for Roysden.

492 WILKES, J. This is an action of ejectment to recover one thousand acres of land in Scott and Fentress counties. There are two bills consolidated and heard together in the court below, and the controversy as it comes to this court only involves one thousand acres, or so much of a five thousand acre tract as is embraced in two deeds from Cyrene Carson and wife—one to Chandler and Smith, of date November 6, 1882, and the other to John Carson, dated December 27, 1887. These deeds purport to convey an undivided interest of two-thirds to Chandler and Smith and one-third to John Carson. The complainants deraign their title from the state, while the defendants claim under the deeds stated, coupled with more than seven years' adverse possession.

The court of chancery appeals, after reviewing the evidence, reports that the Carsons entered upon the land and erected improvements in 1885, and went to live upon it in 1886, and the deed was made to John Carson in 1887, and from that time up to the filing of the bills in these causes John Carson was in

actual possession of the land, claiming for himself and his co-tenants, Chandler and Smith, openly, continuously, exclusively, and adversely—that is, he occupied the land with his ⁴⁹³ father, the latter being the head of the household—and that court concludes, as a matter of law, that being a mixed possession, the true possession and holding is in the son, who had the legal title.

The bill against John Carson was filed July 13, 1896, or over eight years after he had taken and been in possession, and the court of chancery appeals concludes that he is protected by his plea of seven years' adverse possession under the statute of limitations. And this, we think, is correct, even if the son be a minor: *McLemore v. Durivage*, 92 Tenn. 482, 22 S. W. 207, and cases there cited.

The bill against Chandler (for Smith is not sued) was filed December 27, 1894. He was never in actual possession, but insists that the successive possessions of Cyrene and John Carson inured to his benefit, they being tenants in common with him—that is, Cyrene Carson from 1882 to 1887, and John Carson after that date.

The court of chancery appeals reports that the Carsons, father and son, entered upon the land in 1885 and made improvements, and that they moved upon it in 1886 and continued to occupy it till these suits were brought.

Cyrene Carson claimed the land under a deed executed to him by Marion in 1867, and up to 1882, when he conveyed an undivided two-thirds interest to Chandler and Smith, he claimed it alone. After that date he claimed it as a tenant ⁴⁹⁴ in common with Chandler and Smith up to 1887, when he conveyed his one-third interest then owned to John Carson, and John Carson and Chandler and Smith became tenants in common. Now, two questions arise under this state of the case. One is, Did the holding by one tenant in common inure to the benefit of the other tenants in common? And if so, could the successive holding of two different tenants in common be joined together and inure to the benefit of the tenant in common not in possession?

We think that the possession of one tenant in common is the possession of all, unless he claim to hold exclusively for himself; and will exclude all adversary constructive possession in another having the legal title to the land: *Cunningham v. Roberson*, 1 Swan, 138; *Meriwether v. Vaulx*, 5 Sneed, 311; *Elliott v. Holder*, 3 Head, 699.

We are of opinion also that the successive possessions may be connected when the parties hold under color of title and not as mere naked trespassers without color of title: *Nelson v. Trigg*, 4 Lea, 701; *Ellege v. Cooke*, 5 Lea, 623; *Napier v. Simpson*, 1 Tenn. 448-453.

The adverse possession in this case commenced in 1885 by Cyrene Carson, holding for himself and Chandler and Smith. It so continued until 1887, when the adverse possession shifted with the title to John Carson, holding for himself and Chandler and Smith.

⁴⁹⁵ We think the suit in the federal court in 1889 is not material. It was brought against Cyrene Carson, who did not then claim to own the land and was not in possession, and this suit could not interrupt the possession of John Carson or Chandler and Smith, the true owners. At that time Cyrene Carson was not holding for them. There does not appear to have been any actual entry under the writ of possession. The court of chancery appeals reports that the facts intended to show that John Carson and Chandler and Smith aided such a suit, only appears in the statement of Cyrene Carson, and that court refuses to credit the statement altogether, so that the facts do not appear upon which to base an estoppel if the principle could apply.

We are of opinion, therefore, that the decree of the court of chancery appeals should be affirmed as to John Carson and reversed as to Chandler, and the bill should be dismissed at cost of complainants.

THE POSSESSION OF ONE TENANT IN COMMON inures to the benefit of his cotenants: *Gillaspie v. Osburn*, 3 A. K. Marsh. 77, 13 Am. Dec. 136; *Mallett v. Uncle Sam etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594.

ADVERSE POSSESSION.—ON TACKING SUCCESSIVE POSSESSION, see the notes to *Innis v. Miller*, 13 Am. Dec. 331, 332; *Rembert v. Edmondson*, 63 Am. St. Rep. 821, 822. Entry and possession by one of several heirs of a person dying in adverse possession of land inure to the benefit of himself and all the coheirs, and the adverse possession is thereby continued for the purpose of gaining title: *Watson v. Gregg*, 10 Watts, 289, 36 Am. Dec. 176.

RAILROAD v. FERGUSON.

[105 Tenn. 552, 59 S. W. 343.]

NAVIGABLE STREAMS.—A river which is in fact navigable at certain seasons of the year during good tides to light draught boats is a navigable stream, whether it has been declared so by the legislature or not.

NAVIGABLE STREAMS—BRIDGES.—A STATE LEGISLATURE may authorize the construction of a bridge over a stream entirely within the limits of the state, notwithstanding such bridge might work inconvenience to the right of navigation.

NAVIGABLE STREAMS — BRIDGES — OBSTRUCTING NAVIGATION.—Under a general authority to build bridges over streams, a railroad must so construct its bridges as not to interfere unnecessarily with the navigation of the streams.

PLEADING.—A PRESCRIPTIVE RIGHT cannot be shown under a plea of the general issue, but must be set up by special plea.

NAVIGABLE STREAMS—RIGHT TO OBSTRUCT—PRESCRIPTION.—The right to obstruct a navigable stream by means of an unauthorized railroad bridge cannot be acquired by prescription.

NAVIGABLE STREAMS—QUESTION OF FACT.—The question of the navigability of a stream is one of fact, to be determined by the jury.

Mayfield, Son & Aiken and Cooke, Swaney & Cooke, for the railroad.

Garnett Andrews, S. B. Smith, and Champ & Andrews, for Ferguson.

553 BEARD, J. The defendant in error was the owner of a steamboat built for the purpose of, and used by him in, plying the Hiwassee river when there was sufficient depth of water.

In his declaration filed in this cause it is averred that plaintiff in error maintained a bridge over this stream so low as greatly to interfere with its navigation, and that by reason of such improper construction his steamboat was "wrongfully, **554** unlawfully, and unjustly prevented from navigating said stream and from reaching its destination in time, to his great and special damage and injury." For the loss sustained in this alleged unlawful detention this action was brought.

The railway company first demurred to the declaration. This demurrer was overruled by the court, but as no complaint is made of the action of the trial judge in this respect, it is unnecessary to set out the grounds of demurrer. Pleas—six in number—were then filed. The first of these was the plea of not guilty. The second, third, fourth, and fifth pleas set up

as a bar to the action; in one form or another, a prescriptive right to maintain the bridge, because the railway company and its predecessors in title had built and maintained it or similar structures in the same position for more than twenty years, and more than fifty years before the injury complained of. The sixth plea was that of the three-years statute of limitations. The pleas referred to above as raising the prescriptive right of the defendant to maintain the bridge in its then altitude were demurred to and the demurrer was sustained. So the cause proceeded to trial upon the two pleas, one of not guilty and the other the statute of limitations, and resulted in a verdict and judgment for the plaintiff.

From the agreed statement of facts it appears that the original right to erect and maintain a ⁵⁵⁵ bridge at the point in question is found in a charter granted by the legislature of Tennessee to the Hiwassee Railroad Company in 1836, and in the exercise of this right that company, as a part of its railroad, constructed a bridge between "Calhoun, in McMinn county, and Charleston, in Bradley county," at some time prior to the year 1845; and that, under legislative authority subsequently conferred, all the corporate rights, franchises, and property of this company and of its various successors passed ultimately into the present plaintiff in error. It further appears that its predecessors in title and the present owner, the plaintiff in error, "have continuously and successively rebuilt and maintained said bridge . . . upon and at the site of its original location, and that said railroad bridge has not, since its original erection, at any time been lowered to a less height above the river than was the original bridge," and, in fact, "that the bridge now in controversy is somewhat higher than was the original structure."

It also appears "that in the spring season and winter, when there is a good tide in the river, a light draught steamboat now and then runs up the river to the mouth of the Ocoee river, in Polk county, Tennessee, some fifteen or twenty miles by river above Charleston," and that at high tide such a boat can run up to a point some twenty-five or thirty miles above Charleston.

⁵⁵⁶ The case was tried upon this agreed statement of facts and evidence of the additional fact that at a certain period within three years before the institution of this suit, when the river was swollen to a considerable but not unprecedented degree by a heavy rainfall, the steamboat of the defendant was detained while transporting a cargo of valuable freight by the obstruction of this bridge, to the loss of its owner.

On this record it is clear that the Hiwassee was a navigable river within the definition of such a stream, as frequently repeated by this court: *Elder v. Burrus*, 6 Humph. 367; *Stuart v. Clark*, 2 Swan, 9, 58 Am. Dec. 49; *Sigler v. State*, 7 Baxt. 493.

The fact that it has never been declared a navigable river is immaterial, as it does not require legislative sanction of either Congress or of the state to give a stream navigable status: *Little Rock etc. R. R. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

The stream is entirely within the territorial limits of Tennessee, and it was within the power of the legislature of the state to authorize the construction of this bridge, notwithstanding it might work inconvenience to the right of navigation: *Commonwealth v. Breed*, 4 Pick. 460; *Depew v. Board of Trustees etc.*, 5 Ind. 8.

The rule as laid down by Judge Cooley in his work on Constitutional Limitations, page 592, is that "if the stream is not one which is subject ⁵⁵⁷ to the control of Congress, the state law permitting the erection cannot be questioned on any ground of public inconvenience. The legislature must always have power to determine what public ways are needed and to what extent the accommodation of travel over one way must yield to the greater necessity of another."

The question, therefore, in such a case is, Has the legislature, while giving authority to build a bridge, made it lawful for the company so to construct it as to prove, either all the time or at recurring periods, an obstruction to craft adapted to its navigation? This question plaintiff in error insists is answered by its charter. Upon referring to that, however, it is found that the authority thus given is simply "to build bridges." The character of such bridges is not defined nor are the names of the streams mentioned to which this authority is to be applied. Can there, then, be implied from this general authority "to build bridges" the power to so construct them as either to destroy or else to interfere seriously with the passage of water craft upon such internal streams as may be crossed by the company in the extension of its line of road? We think not. The state is interested in the preservation of the natural ways of communication between its different and separated communities, which may greatly serve their convenience and comfort, as well as in the building and operation of new and artificial ⁵⁵⁸ lines. In the absence of express provisions it will not be assumed that it was the purpose of the legislature to authorize the construction of a permanent structure over one of its streams

susceptible of use for navigation, which would seriously impede the enjoyment of that use. It would be otherwise as to obstructions which were temporary in character and absolutely necessary in the erection of a lawful structure. While during their existence they might work inconvenience to the public in depriving it of the full use of the stream, yet if this obstruction was necessary to the exercise of the granted right, it would not be declared illegal: *People v. Horton*, 60 N. Y. 610; *Cantrell v. Railway Co.*, 90 Tenn. 638, 18 S. W. 271.

In *Hamilton v. Vicksburg etc. R. R. Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206, it is said: "In the case at bar no specific directions as to the form and character of the bridges over the streams on the line of the railroad were prescribed by the legislature of the state. The authority of the company to construct them was only an implied one, from the fact that such structures were essential to the continuous construction of the line. Two conditions, however, must be deemed to be embraced within this implied power; one that the bridges should be so constructed as to insure safety to the crossing of the trains, and the other that they should not interfere unnecessarily with the navigation of the streams."

559 In *Cantrell v. Railway Co.*, 90 Tenn. 638, 18 S. W. 271, as in the foregoing case, the right to erect the bridge in question rested on implication from the state's grant of authority to build and operate the particular line of railroad. In that case the complaint was that the railway company, in the erection of a bridge over Clinch river, had obstructed its navigation by the use of temporary trestle and other structures, and this court said such obstruction was not unlawful if it covered no more of the stream and was no longer continued than the necessity of the case demanded and required.

The charter right on which plaintiff in error rests for its defense in this case is not higher or greater than was that of the corporations involved in these last two cases; in this the right "to build bridges" is expressly given, while in those it arose by necessary implication. In neither was the form or character of such bridges prescribed. But as the "authority to throw a bridge over a navigable stream is an exception from the general law, by which it is forbidden, granted by the legislature in view of the greater advantages to the public which are expected to result from the improvement," this authority "must be confined to the limits and conditions of the grant" (*Memphis etc. R. R. Co. v. Hicks*, 5 Sneed, 427), and it will not be extended to cover

a structure that is in any respect a public nuisance. Under such granted power, if a bridge is erected over a ⁵⁶⁰ navigable stream "it must be sufficiently elevated as to admit of the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travelers or freight upon the river or watercourse spanned by the bridge, or if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation": *Jolly v. Terra Haute Draw-Bridge Co.*, 6 McLean, 237, Fed. Cas. No. 7441.

Under the facts of the case, and in view of the rule as announced by these authorities, we have no hesitancy in saying that the railway company cannot protect itself against the present claim of the plaintiff below by an appeal to its charter.

It is insisted, however, by the company that the continued maintenance of this bridge "for twenty years and fifty years," though it be an impediment to navigation, gives it a prescriptive right which is a conclusive defense to this action. Even should it be conceded that a right to obstruct a navigable stream could be created by prescription, yet it is not relied upon by plea, so as now to be of avail to the plaintiff in error. As was said in the preliminary statement of the case, there were filed four pleas setting up in various forms the right of prescription, but on demurrer they were stricken out by the trial judge. No assignment of error is made on this action. The case therefore stands, in this court, ⁵⁶¹ as if prescription had never been relied on. For the rule is well settled that a prescriptive right cannot be shown under the plea of the general issue, but must be set up by special plea: *Shields v. Schiff*, 124 U. S. 351, 8 Sup. Ct. Rep. 510; *McKyring v. Bull*, 16 N. Y. 307, 69 Am. Dec. 696; *Matthews v. Ferres*, 45 Cal. 51.

But it is plainly inferable from the record that the learned counsel for the railway company abandoned their special pleas because satisfied that they tendered issues not maintainable in law. For the rule seems to be universally accepted that a right to obstruct a public highway cannot rest on prescription. Such an obstruction is a common nuisance: *Elkins v. State*, 2 Humph. 543; *Elliott on Roads and Streets*, 668; *Gould on Waters*, sec. 532; *Arundel v. McCulloch*, 10 Mass. 70; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Morton v. Moore*, 15 Gray, 573.

It is also contended by the railway company that the trial judge improperly gave in charge to the jury sections 1808 and 6869 of Shannon's Code. There was no error in this. They

were pertinent to the controversy. Even if they had not been they worked no harm to the company. For when it is once determined that the Hiwassee is a navigable river, it did not require the aid of section 1808 to make it a public highway; the common law, in the absence of section 6869, forbade its obstruction to the detriment of navigation.

⁵⁶² Again, it is insisted that the trial judge erroneously instructed the jury that the question of the navigability of the Hiwassee river was one of fact to be determined by them. There was no error in this: *The Daniel Ball*, 10 Wall. 557; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58. Other questions arising in the case are disposed of orally.

The judgment of the lower court is affirmed.

A FRESH-WATER STREAM IS NAVIGABLE and a public highway only when susceptible of being used as a highway of commerce over which there may be trade, travel, transportation, or floatage for a season or a considerable portion of the year: *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 53 Am. St. Rep. 133, 16 South. 623. See, further, *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941; *People v. Elk River Mill etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531. The navigability of a stream is a question of fact: *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60.

BRIDGES OVER NAVIGABLE RIVERS of a state may be authorized by the legislature, provided they do not materially injure navigation: *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295. A general authority to erect a bridge does not authorize its construction in such a manner as to prevent navigation of the river: *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255.

MINNIS v. ABRAMS.

[105 Tenn. 662, 58 S. W. 645.]

WITNESSES—SUIT AGAINST ADMINISTRATOR—EVIDENCE.—Under a statute providing that in actions against administrators neither party can testify against the other "as to any transactions with or statements by the testator," a plaintiff may testify that he has a letter in his possession and that the letter is in the handwriting of the deceased, since these are independent facts and do not constitute transactions with or statements by the deceased.

Hickey & Peeples, for Minnis.

J. M. Trimble, for Abrams.

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⁶⁶² McALISTER, J. This bill was filed to collect balance due on a promissory note and to enforce vendor's lien for same on tract of land in Hamilton county.

The principal controversy in the case was whether ⁶⁶³ the note was barred by the statute of limitations. The note was for four hundred dollars. It was dated in 1886, and the bill was not filed until 1898. Complainant relied on a new promise made by a letter written to complainant by the maker of the note, in which he assured him the statute of limitations should never run against the debt and lien. The maker of the note died, and this bill was filed against his widow, heirs, and devisees to enforce the vendor's lien and collect the note. An administrator ad litem was appointed and made a party defendant to this bill. This was, therefore, a suit between the complainant and the administrator of the estate, and the statute forbidding either party to testify in respect of communications and transactions with the deceased would apply. The court of chancery appeals excluded all testimony by the complainant as to communications and transactions with deceased, but held that it was competent for complainant, although a party to the case, to testify to the independent fact that he had this letter in his possession, and that it was in the handwriting of his uncle, the deceased maker of the note. The section of the code referred to is as follows, viz.: "In actions or proceedings by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements by the testator, intestate, or ⁶⁶⁴ ward, unless called to testify thereto by the opposite party": Shannon's Code, sec. 5598.

The policy of the statute is to provide that when one of the parties to a litigated transaction is silenced by death, the other shall be silenced by law: Wharton on Evidence, sec. 466. It will be observed that the statute simply excludes proof of transaction with or statements by the deceased, but does not make the surviving party incompetent as to other matters. We do not think proof by the surviving party that he had a letter in his possession, and that the letter is in the handwriting of the deceased, is in contravention of the statute. These are independent facts, which we hold may be proven by either party to the suit. It was held by this court in *Montague v. Thompson*, 91 Tenn. 173, 18 S. W. 264, that preliminary to the introduction of other proof it was competent for the surviving party to

state as independent facts that he at a particular time possessed a letter or written instrument, and that it had been unintentionally lost, but he was not competent to testify as to its contents: See *Mason v. Spurlock*, 4 Baxt. 563.

In the present case the court of chancery appeals did not hold that complainant was competent to testify as to contents of the letter, but simply that he had a letter in his possession, and that the letter was in the handwriting of the deceased. The letter then spoke for itself.

⁶⁶⁵ There is nothing in the case of *Scott v. Thornton*, 58 S. W. 236 (decided at Jackson, Tennessee, April term, 1900), that militates against this view. All that we held was that H. C. Scott, being a party in interest in the record, was disqualified to testify about the transaction in a suit against his deceased brother's estate. It is true the question in that case was in respect of the admissibility of a letter, but complainant was not offered as a witness to testify to the handwriting of deceased.

Affirmed.

WITNESS—TRANSACTION WITH DECEASED.—A party may testify to the writing of a letter in the presence of a person since deceased and handing it to him to read, and that he read and subsequently mailed it, if such letter is produced in evidence, in which event statements therein may be regarded as admissions of the decedent: *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 60 N. W. 31.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

SWINNEY v. EDWARDS.

[8 Wyo. 54, 55 Pac. 306.]

NEGOTIABLE INSTRUMENTS—GAMBLING CONTRACT.—

Under a statute providing that all contracts or notes, the consideration whereof shall be money or any other valuable thing, won by gaming, shall be utterly void and of no effect, a note given in settlement for money lost by the maker in a gambling game is void, no matter in whose hands it may be, nor does the subsequent verbal promise of the maker of the note to pay the holder thereof render him liable thereon.

Burke & Fowler, for the plaintiff in error.

E. H. Fourt, for the defendant in error.

⁵⁶ CORN, J. This was a suit brought by Edwards, the defendant in error, against Swinney, the plaintiff in error, upon a promissory note of Swinney due three months from date, and payable to Edwards. The defense was that the consideration of the note was money won at cards. Upon a trial by the court without a jury the court found for the plaintiff generally, and gave judgment in his favor for the amount of the note and interest; but also made special findings, as follows: "That the note was given in consideration of a debt due for a gambling transaction; that the plaintiff was not present at the time the note was given; he was not a party to the note at the time it was made; it was made to him as payee without his solicitation, knowledge, or consent; that he received it, so far as the evidence goes, before it was due; that it had not been paid in whole or in part, and that the plaintiff became its absolute owner at the time it was transferred to him."

The special findings are substantially sustained by the evidence, which also shows that Edwards, Swinney, and one Bethel had engaged in playing cards, and that Swinney lost; Edwards quit the game and left the place before the game closed. Swinney, at the close of the game, settled his losses by giving this note to Bethel, and it was made payable to Edwards at Bethel's request. The next day Bethel turned it over to Edwards in part payment of a prior debt of Bethel to Edwards. Edwards testified that he believed the note was given in settlement of a gambling account; but that he had no personal knowledge in regard to it, and there is no direct evidence whether or not he was so informed at the time he accepted the note.

Section 1001 of the Revised Statutes of Wyoming provides that all contracts, notes, etc., made or entered into where the whole or any part of the consideration thereof shall be for any money or other valuable thing won by any gaming, or by playing at cards, shall be utterly void and of no effect.

Upon the evidence and upon the special findings the ⁵⁷ judgment should have been for the defendant, plaintiff in error. The well-settled rule of law is, that when mere illegality of consideration is relied upon, the defendant may show such illegality in a suit between the original parties to the note; but when a negotiable instrument has passed, in the ordinary course of business, into the hands of a bona fide holder for a valuable consideration, and without notice of such illegality, the defendant cannot avail himself of such defense if the holder obtained the note before maturity. This is the general rule, and it is the same whether the illegality is at common law or declared by statute. But, apparently by way of exception to the rule, when the legislature has declared that the illegality of the contract or consideration shall make the note void, the defendant may set up that defense though the note be in the hands of a bona fide holder. The reason of the rule is, that if innocent parties were allowed to recover, the winner would always avoid the statute by transferring the notes; and this consideration is deemed to outweigh the occasional loss or inconvenience which may occur to innocent persons in the course of business. The rule is the same in this country and in England, and the authorities seem to be uniform upon the subject. It is also applied in the case of usurious contracts made void by statute. It was applied in Georgia where a statute declared contracts with an attorney at law to be null and void whenever the attorney should fail to attend to the suit in person, or by

some competent attorney up to the rendition of the judgment: *Weed v. Bond*, 21 Ga. 195; *Glenn v. Farmers' Bank*, 70 N. C. 191; *Vallett v. Parker*, 6 Wend. 615; *Ivey v. Nicks*, 14 Ala. 564; 8 Am. & Eng. Ency. of Law, 1019, where the authorities are collated.

The note in this case is clearly within the statute, and is void, in whose hands soever it may be. The fact that Swinney afterward verbally promised Edwards to pay the note does not change the situation. The promise is void for want of consideration: *Mordecai v. Dawkins*, 9 Rich. 262.

58 The judgment will be reversed and remanded, with instruction to the district court to enter judgment for the defendant for costs.

Potter, C. J., and Scott, D. J., concur.

Knight, J., did not sit in this case.

A NOTE GIVEN IN CONSIDERATION OF A GAMING contract is void in the hands of a bona fide holder: *Snoddy v. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127. Compare *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; *Lynchburg Nat. Bank v. Scott*, 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487.

DURLACHER v. FRAZER.

[8 Wyo. 58, 55 Pac. 306.]

CORPORATIONS HAVING BUT ONE STOCKHOLDER.—

Though one person owns or controls all the stock in a corporation and has conveyed to it all of his property, and as president, treasurer, and manager is given complete control of its operations by its by-laws, yet he and the corporation are legally two distinct persons, each having the right to own property and contract debts, and each bound by its and his obligations in regard thereto, as fully as if two distinct natural persons. That the corporation owes its president's debts cannot be conclusively presumed in such case from the fact that, though operating under a corporate name, he was, in fact, still conducting the same business which he owned and operated as an individual.

CORPORATIONS—CONTRACT TO PAY INDIVIDUAL DEBTS.—To establish the existence of a verbal contract on the part of a corporation to pay individual debts, there must be proof of some expression on the part of the debtor, and someone representing the corporation, showing that the minds of the contracting parties, or their agents, met and agreed upon the proposition.

EVIDENCE—CONTRACTS.—It is not competent for a witness to testify that a certain contract was or was not made. He may state what was said or done and the conclusion is for the court or for the jury.

CORPORATIONS—CONTRACTS.—The unexpressed intention of a person claiming to act for himself on one part and for a corporation on the other does not constitute a contract. Hence, the mere intention of one who conveys all of his property to a corporation and takes stock therefor, that his individual debts shall be paid out of the proceeds of the corporation, does not bind the latter if there is no actual agreement to that effect between himself and the corporation.

CORPORATIONS CANNOT GIVE AWAY THEIR PROPERTY or transfer it, unless in good faith and for value, if their creditors are thereby left unsecured. They cannot use their entire capital in payment of a private debt of their president, which they are under no legal or moral obligation to pay.

CORPORATIONS—CONTRACTS.—A chattel mortgage on all of the personal property of a corporation to secure the individual debt of its president created previously to its incorporation is not binding against the corporation creditors, unless there is an agreement by the corporation to assume such indebtedness at the time of its incorporation.

CORPORATIONS — CONTRACTS—CONSIDERATION.—The substitution of the corporate name on a note, as principal, in a transaction extending the debt, without consideration to the corporation, where the note was originally given by the president of such corporation for his individual debt, does not bind the corporation as against its creditors.

C. E. Carpenter and J. W. Lacey, for the plaintiff in error.

M. C. Brown, C. P. Arnold, and N. E. Corthell, for the defendant in error.

⁶⁸ **CORN, J.** This is an action of replevin, and the defendant (defendant in error) is the sheriff of Albany county. Defendant had possession of the property, several thousand dollars' worth of merchandise, fixtures, etc., under levies of various attachment writs against "The A. M. Bauman Mercantile Company."

For some years prior to 1896, A. M. Bauman was in the grocery business at Laramie. August 18, 1893, he ⁶⁹ borrowed from the plaintiff \$6,000, and gave her a mortgage on his homestead running three years, as security. Subsequently, he bought a store building for \$6,500, borrowed the amount from the plaintiff, and to secure her gave her a mortgage on the building dated May 23, 1894, and running three years. He also owed the First National Bank of Laramie \$4,000, and on January 29, 1896, he and the plaintiff executed their note to the bank for the amount, payable in ninety days. He also owed the Albany County National Bank a note for \$2,000, due February 2, 1896, and had other debts, which made his total indebtedness on February 1, 1896, \$22,705.28 as shown by his books. His assets, as shown by his

books, amounted to \$31,667.09. On the last-named date he organized a corporation under the name of A. M. Bauman Mercantile Company, with a capital stock of \$33,000, divided into three hundred and thirty shares. He controlled the entire stock, three hundred shares being issued directly to him, twenty-seven shares assigned to his wife, and one share each to three of his employes, who were also made directors. The certificates for the last-named thirty shares were made out, but never signed or delivered. The stock was issued as fully paid. On February 5, 1896, he borrowed for the company \$3,000 from the First National Bank of Laramie, and hypothecated one hundred of the shares as collateral, afterward turning over another one hundred as additional security for this loan. On the same day he executed a bill of sale to the company of all his personal property, including the stock of merchandise, store fixtures, etc., the consideration named being \$20,500. On the eighth day of the same month he conveyed his real estate by warranty deed to the company, the consideration named being \$11,700. Though the real estate was encumbered with mortgages to the amount of \$12,500, the deed contained a general warranty against all lawful claims, and both conveyances acknowledged the receipt of the considerations recited. Mr. Bauman, in addition to having control of all the stock of the corporation, and being one of its directors, was president, treasurer and ⁷⁰ general manager, and the by-laws gave him entire control of all its business transactions. On May 2, 1896, the indebtedness of \$4,000 to the First National Bank was extended by a new note signed "The A. M. Bauman Mercantile Co., A. M. Bauman, Prestd. and Treasurer," and by the plaintiff. After the incorporation, the company, or Bauman, out of the funds of the company, paid something like \$2,500 of his individual debts due to various parties, including interest on the plaintiff's mortgages for \$12,500. The corporation, while engaged in business, obtained credit, and at the time of the institution of this suit, was indebted to various parties, including those represented by the defendant sheriff in this action, in about the sum of \$4,000. About January 1, 1897, the company was embarrassed and unable to pay its bills as they became due, and was being pressed by some of its creditors. On January 11th, in pursuance of a resolution passed by the trustees on that day, the company executed its note to the plaintiff for \$9,000, running two years, and also a chattel mortgage securing it on all its stock, fixtures, accounts, and bills receivable. The resolution

recited that it was for the purpose of securing her against the \$4,000 due the bank, and to give her additional security to the amount of \$5,000 of the \$12,500 for which she held mortgages on the real estate, it having depreciated in value. The mortgage was deemed defective in some respects, and a new one was executed and duly filed on January 18th. On January 20th possession of the store and the mortgaged property was turned over to the plaintiff under this mortgage, and certain creditors thereupon sued out attachments amounting to more than \$4,000 against the company, and the sheriff took possession of the property by virtue of the writs. The plaintiff then retook the property in this action of replevin. The case was tried by a jury, and there was a verdict and judgment for the defendant.

The record is very voluminous, one hundred and ten errors being assigned as grounds for a new trial. But in our view of the ⁷¹ case it will not be necessary to consider these assignments in detail.

The pivotal question in the case is whether the plaintiff's chattel mortgage, under which she took possession of all the personal property and effects of the company on January 20, 1897, was a valid lien based upon an actual debt or obligation of the company, as against its existing creditors. It is shown and not denied that the \$4,000 due the bank, and the \$12,500, of which the remaining \$5,000 of the chattel mortgage is a part, were originally the individual debts of Mr. Bauman. The primary question, then, is whether they, or either of them, became the debt of the company. It is true that in a sense Bauman was practically the company. He owned or controlled all the stock, was given complete control of its operations by the by-laws, and conveyed to it all his property. But, nevertheless, he and the company were legally two distinct persons, each having the right and power to own property and contract debts, and each bound by its and his own obligations in regard thereto, as fully as if they had been two distinct natural persons: *Schufeldt v. Smith*, 139 Mo. 372, 40 S. W. 887; *Georgia Co. v. Castleberry*, 43 Ga. 188; *McClellan v. Detroit File Works*, 56 Mich. 583, 23 N. W. 321. That the company, therefore, owed Bauman's debts is not to be conclusively presumed from the fact that though operating under a corporate name, he was, in fact, still conducting the same business which he had owned and operated as an individual; but it is a question of fact to be determined by the evidence.

It is uncontroverted that the only writings which passed between Bauman and the company were a warranty deed for the real estate and a bill of sale of the personal property containing no reservations, delivered by him to the company, upon the one hand, and certificates for three hundred and thirty shares of the capital stock of the company, received by him from the company, upon the other hand. The par value of the shares was \$33,000, and they were stipulated to be fully paid up. The consideration expressed ⁷² in the deed was \$11,700, and in the bill of sale \$20,500, making an aggregate of \$32,200. So far as the writings are concerned, therefore, I do not think it can be contended that they express or imply any contract upon the part of the company to pay Bauman's individual debts, amounting, as the evidence shows, to more than \$22,000. If there was such a contract, then, upon the part of the company, at the time of the transfer of the property to it, and in consideration of such transfer, it must have been verbal or else implied from all the circumstances of the transaction.

To establish the existence of a verbal contract there must be proof of some expression upon the part of Bauman, and some one representing the company, showing that the minds of the contracting parties, or their agents, met upon the proposition and agreed. There must have been some form of words showing the mutuality which is an essential of every contract. The change in the ownership of the property and the conduct of the business from Bauman to the company is not a mere form to suit the convenience and business purposes of Bauman. It was and must be treated as an actual transfer of the property and business from one individual to another, both having full power under the law to hold property and make contracts, and both bound by the same obligations in regard thereto, as if both were natural persons. In the deed and bill of sale there is no intimation of such a contract; no resolution to that effect appears in the records of the corporation, and it is admitted none was ever adopted; Bauman and Howard both testify that it was never mentioned. There is absolutely no evidence of any express contract of the corporation to pay the debts of Bauman.

But Bauman and Howard, a director, and the bookkeeper of Bauman and also of the company, both testify that it was "understood" that the company was to pay the debts of Bauman. And it is contended by the plaintiff in error that this is not only evidence of the fact, but ⁷³ that it is ample proof that there was such a contract. Such a statement entirely

unchallenged and standing alone might be more or less convincing to a court or jury that such a contract had been made. But both testify upon cross-examination that the subject of the payment of the debts of Bauman by the company was never mentioned; and Bauman, upon being asked the question, "You simply understood that yourself, and nobody else understood anything about it?" answered: "Well, yes, it might be that way; I should say it was never mentioned at all. . . . Nobody ever spoke of it? . . . No, sir." How Howard reached the conclusion that it was "understood" may perhaps be easily accounted for by the fact that he knew that Bauman did actually pay a large amount of his private debts with the money of the corporation. But it is not competent for a witness to testify that a certain contract was or was not made. He may state what was said or done, and the conclusion is for the jury or the court. The facts, as distinguished from their conclusion, are stated by Bauman and Howard upon their cross-examination. Howard's testimony furnishes no proof whatever of the making of the alleged contract; but, upon the contrary, seems quite conclusively to show that if any such contract was made, he has no knowledge of the facts by which it is to be made to appear. Bauman's testimony at the utmost only tends to show that it was his own intention to pay his private debts out of the resources of the corporation, for upon cross-examination he admits that, so far as he knows, no one else than himself so understood. Even that it was his intention at the time of the transfer of the property is strongly negatived by other facts in the case. He gave a clean bill of sale of his personal property, and the payment of his debts was not named as part of the consideration. He gave a deed of the real estate, and the payment was not only not named as part of the consideration, but he covenanted with the company against his debt \$12,500 by which the property was encumbered. But if it be admitted ⁷⁴ that this was his intention, such mere unexpressed intention or understanding of Bauman that he would pay his private debts from the resources of the corporation, and this is the utmost the evidence tends to show, falls short in the elements necessary to constitute a contract. A valid contract involves an offer and acceptance, and it must bind both parties: 3 Am. & Eng. Ency. of Law, 641. The essentials of a contract are said to be: "A person able to contract, a person able to be contracted with, a thing to be contracted for, a good and sufficient consideration, clear and explicit words to express the con-

tract, the assent of both contracting parties": Beach on Contracts, sec. 1. "A contract is the meeting of two minds": Beach on Contracts, sec. 15.

Many authorities are cited by counsel sustaining contracts entered into with corporations by their directors or officers. But we find no case where the mere silent mental operations of one individual, claiming to act for himself as the one party and for the corporation as the other, have been held to constitute a contract. Referring to some of the cases cited upon this branch of the case, *Marsh v. Whitmore*, 21 Wall. 178, was a case where bonds belonging to the plaintiff were sold for him by his attorney at public auction, and were bought by third parties for the attorney. In *Bassett v. Brown*, 105 Mass. 551, an agent for the sale of land procured a deed to be made to himself, the deed being executed by the principal in person. In *Thomas v. Brownsville R. R. Co.*, 109 U. S. 522, 3 Sup. Ct. Rep. 315, the contest was upon a bill to foreclose a mortgage executed by the company to the plaintiffs, two of whom were directors of the company. In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, the company was embarrassed and a director loaned money to it, taking a deed of trust upon its property to secure the loan. He subsequently bought in the property at public sale under the trust deed. In *Pneumatic Gas Co. v. Berry*, 113 U. S. 322, 5 Sup. Ct. Rep. 525, the defendant was one of nine directors. The company became embarrassed, he took a lease of its property, ⁷⁵ continued the business, paid money for the company, and rescued it from bankruptcy. The court refused to cancel the lease or require the defendant to account for profits. In *Leavenworth Co. v. Chicago etc. Ry. Co.*, 134 U. S. 688, 10 Sup. Ct. Rep. 708, a director purchased property from a third party in alleged violation of his duty to the company. These and like cases are many of them instructive for the purpose for which they were originally cited by counsel, that a contract between a corporation and its officers is not void but voidable. But they do not, as contended in counsel's reply brief, meet the objection that the assent of two persons is required in every contract, and that there is no evidence in this case tending to show such assent.

The evidence leaves no room for any doubt that the Bauman Mercantile Company was insolvent. It was not only being pressed by debts which it was unable to pay, but by its mortgage and the transfer by virtue of it to the plaintiff it was left without a dollar in money or property except its equities in the real

estate. These were valueless. The execution of the mortgage by the company and the acceptance of it by the plaintiff, under the circumstances shown, was an admission by both of them that the real estate was not sufficient security for the encumbrances upon it by \$5,000.

The American courts, following *Wood v. Dummer*, 3 *Mason*, 311, Fed Cas. No. 17,944, have usually held that the capital of a corporation is a trust fund for the payment of its debts: *Morawetz on Corporations*, sec. 780; *Sanger v. Upton*, 91 U. S. 60; *Union Ins. etc. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 547, 37 Am. Rep. 129, authorities cited; *Thompson on Corporations*, sec. 2951.

Some of the courts, it is true, have objected to this statement of the law, but it is uniformly held that a corporation cannot give away its property or transfer it, unless in good faith for value, if its creditors would thereby be left unsecured: *Morawetz on Corporations*, 789; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, 4 S. E. 431; *Beach v. Miller*, 76 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464; *Hall v. Goodnight*, 138 Mo. 581, 37 S. W. 916; *Shufeldt v. Smith*, 139 Mo. 372, 40 S. W. 887. This is precisely what was attempted in this case—to use the entire capital of the company in payment of a private debt of the president which it was under no legal or moral obligation to pay.

In *Shufeldt v. Smith*, 139 Mo. 372, 40 S. W. 887, a partnership composed of three members converted the partnership into a corporation. Subsequently, the company executed a deed of trust, preferring, among others, certain debts of the old firm. Other creditors attempted to have the deed set aside upon the ground that these were not debts of the company. The deed was sustained, but upon the specific ground that the evidence, by positive affirmative testimony, showed a verbal agreement that the company was to take all the property of the firm and assume all its debts.

Hall v. Goodnight, 138 Mo. 581, 37 S. W. 916, was a case in many of its features similar to the one under consideration. Chamberlain and Terry had been in partnership in the mercantile business. C. bought out T.'s interest in the stock of goods, and gave his note for the purchase price. After continuing the business for a time alone, C. organized a corporation, conveyed to it his property and took all the capital stock. He

kept up the organization by making his clerks and employ  s nominal stockholders of a share each, and for years paid interest on the note out of the proceeds of the same stock of goods. There was a by-law of the company giving him full power of management, and he controlled the entire business, the other stockholders always obeying his wishes. The company sold to Hall and Terry the goods in dispute at the invoice cost price of \$8,100, and they paid the amount \$3,806 in checks and cash, and the balance (\$4,294) by surrendering the Terry note. The court found that Chamberlain intended the note should be satisfied out of the assets of the concern, and Terry was consulted (as one having an equitable interest in the matter) about the incorporation at "the time, and consented to that move. But the court say: "The debt due from Mr. Chamberlain to Mr. Terry (being merely an individual debt for which the company was at no time either morally or legally bound) could not be paid from the assets of the corporation, even by consent of all the stockholders, without committing a fraud on the then creditors in the circumstances disclosed." In reply to the contention of plaintiff "that the note represented the purchase price of the stock of merchandise, and that the assets of the company were, therefore, still equitably bound to respond to that obligation," the court say: "It is clear the stock of goods was turned over to that company by Mr. Chamberlain for the shares of capital stock of the company which he received. . . . The merchandise was paid for (as between Chamberlain and the company) by its issue of capital stock to him, or by the proceeds arising from the capital stock. There is no law or equity to sanction the paying for it again by the company, in the manner which plaintiff's argument seeks to justify." That was a suit in replevin against the sheriff, who had levied writs of attachment, and a judgment for the defendant was affirmed.

But it is said the payment of some \$2,500 of the debts of Bauman by the company corroborates the making of the contract, and is a ratification of it by the company. The difficulty is there was nothing to corroborate and nothing to ratify. The testimony of Bauman, who knew all the facts, shows that the company made no such contract at the time of the transfer of his property. Indeed, when asked what he gave for the total stock of the company, he answered: "All my personal property, real estate, and everything." He also testified that the two papers, the deed and the bill of sale, expressed his

contract with the company. Neither of them make any reference to payment of his debts by the company, but, upon the contrary, in his deed he covenants against the \$12,500 secured upon the real estate. Such ⁷⁸ payments clearly do not tend to show anything else than the carrying out of his intention to pay his individual indebtedness out of the resources of the company.

It is further contended that the execution of the note by the company with the plaintiff as surety for \$4,000 to the bank is an assumption of that debt, and makes it a legal and binding obligation of the company. Originally, the bank held the personal note of Bauman for this amount, with plaintiff as surety. In May, after the incorporation (and after he had obtained the loan for the company of \$3,000 from the bank, one of the attaching creditors in this case), he took up this note, and executed in its place the note of the company, with plaintiff as surety. If the bank were the claimant, by reason of this indebtedness, a different question might be presented. But plaintiff paid off this note, and in doing so she simply paid the debt of Bauman, notwithstanding the form of the paper evidencing the indebtedness. The company received no benefit from the execution of the May note, and there was no injury to the plaintiff. It was a mere extension of the debt of Bauman. As between the plaintiff, Bauman, and the company, the company's note was entirely without consideration. If, as under all the authorities, the officers of a corporation may not give away its capital to the injury of its creditors, it is difficult to see how their act is validated by their naked promise to so waste it or give it away ninety days or six months beforehand. Nor is there any basis whatever for the claim that because Bauman transferred all his property to the company, the plaintiff thereby lost all security for her debt and the assets out of which she might hope to collect it. Bauman conveyed all his property, but received all the stock of the company in exchange. The stock was of the same value as the property at that time, for the company owed no debts. Her debtor being no worse off financially by the exchange, she was not injured.

It is needless to inquire into the many errors assigned as upon the conceded facts the plaintiff, in our opinion, ⁷⁹ was not entitled to a verdict in her favor, and such a verdict could not be sustained by this court. The judgment will be affirmed.

Potter, C. J., and Knight, J., concur.

CORPORATION.—THE PURCHASE OF ALL THE STOCK by one stockholder does not place the corporate property on the same footing with the other estate of the individual stockholder: *Louisville Bank Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335, 21 S. W. 531, 1049. But see *Pott v. Schmucker*, 84 Md. 535, 57 Am. St. Rep. 415, 36 Atl. 592; *First Nat. Bank v. Winchester*, 119 Ala. 168, 72 Am. St. Rep. 904, 24 South. 351.

PROPERTY OF AN INSOLVENT CORPORATION IS A TRUST FUND in such a sense as to preclude its officers dealing with it so as to secure preferences to themselves: See the monographic note to *Buck v. Ross*, 57 Am. St. Rep. 78; *Butler v. Harrison Land etc. Co.*, 139 Mo. 467, 61 Am. St. Rep. 464, 41 S. W. 234.

FIRST NATIONAL BANK v. LUDVIGSEN.

[8 Wyo. 230, 56 Pac. 994.]

STATUTES—CONSTRUCTION.—If plain and unambiguous words or phrases are employed in a statute, they should not be restricted in their operation by reference to the policy of the law, unless that policy is clearly indicated in the act itself.

CHATTEL MORTGAGES — RECORDING — PROTECTION OF CREDITORS.—Under a statute requiring chattel mortgages to be recorded, and providing that otherwise they shall be void "as against creditors of the mortgagor," the latter term embraces all creditors, antecedent as well as subsequent.

CHATTEL MORTGAGES—RECORDING—RENEWAL.—Under a statute providing that unrecorded chattel mortgages shall be void "as against creditors of the mortgagor," an unrecorded chattel mortgage not renewed as required by law ceases to be valid as against creditors of the mortgagor who became such before as well as after the default in renewal.

ESTATES OF DECEDENTS.—The property of the estate of a decedent is bound for the payment of his debts as far as it will go.

EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—The administrator of an insolvent estate, as representative of the creditors, occupies the same position as the creditors themselves in respect to the avoidance of a void chattel mortgage, and is not affected by the fact of its validity as against the decedent.

EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—It is not essential to an avoidance by an administrator of a void chattel mortgage executed by his decedent that a creditor of the estate should have secured a lien by judgment or process.

EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—An administrator of an insolvent estate may in replevin against him defend his possession against a chattel mortgage by showing its invalidity as against creditors of the estate.

EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGES.—A statute authorizing actions for the

recovery of property by and against administrators in all cases where they might have been maintained by or against the intestate does not interfere with the rights of creditors nor affect the right of the administrator of an insolvent estate to recover or defend possession of mortgaged chattels on the ground of the invalidity of the mortgage as against creditors of the estate.

E. E. Enterline and D. A. Reavill, for the plaintiffs in error.

J. H. Chiles, for the defendant in error.

²³³ POTTER, C. J. This is a replevin suit in which the First National Bank of Rock Springs claims to be entitled to the possession ²³⁴ of certain personal property by virtue of a chattel mortgage executed and delivered to it by one John Ludvigsen in his lifetime to secure the payment of the sum of eight hundred and eighty dollars and interest. The bona fides of that indebtedness, and that it was due and unpaid at the commencement of this suit, is conceded.

The mortgage contained a provision permitting the mortgagor to remain in possession of the property, but authorized the mortgagee to take possession in case of default in any of the mortgage conditions. The mortgagor retained possession until his death on November 19, 1896. It then passed into the possession of the defendant in error as administratrix of his estate, letters of administration being issued to her on December 14, 1896. The suit was brought March 23, 1897, and the bank secured possession of the property under the writ and upon the execution of the statutory undertaking. The estate of the decedent mortgagor is conceded to be insolvent, and to have been so insolvent at the time of his death.

The administratrix defends in the right of the creditors, and seeks to hold the property that it may be subjected to the payment of the debts of the estate. She assails the validity of the mortgage as against the creditors of the decedent on account of the failure of the mortgagee to file the statutory affidavit of renewal. It is admitted that no affidavit was filed, and that the statutory time therefor had expired prior to the decease of the mortgagor. When the suit was instituted no claims had been formally presented against the estate except a claim of the administratrix for money advanced for funeral expenses; but afterward and before trial claims aggregating four thousand dollars had been regularly presented and allowed. One thousand dollars of such claims represent indebtedness incurred by the mortgagor prior to the date of the mortgage, and the remainder represents claims incurred subsequent to the execution

of the mortgage, but prior to the default in the filing of a renewal affidavit. The mortgage was duly filed as required by statute on the ²³⁵ day of its date. The value of the property is conceded to be eight hundred dollars.

The action was heard and determined upon an agreed statement of facts. The defendant in error was adjudged to be entitled to the possession, and her damages were assessed at eight hundred and seventy-two dollars and forty-one cents, for which, with costs, judgment was rendered in her favor and against the plaintiff and its sureties. The latter prosecute error.

Although it is conceded that the time arrived and expired for the filing of an affidavit which the statute requires in order to continue the validity of a chattel mortgage as against creditors of the mortgagor, and that the mortgagee defaulted therein, it is nevertheless insisted that the term "creditors" as used in the statute does not comprehend antecedent creditors. This is thought to follow from the intent and policy of the law which counsel esteems to be protection to those who may deal with the mortgagor under the belief that his personal property is unencumbered.

The chattel mortgage act provides that every mortgage of personal property which shall not be accompanied by immediate delivery and be followed by an actual and continued change of possession of the mortgaged property "shall be absolutely void as against the creditors of the mortgagor, and as against subsequent mortgagees or purchasers in good faith," unless said mortgage shall be filed as therein required: Laws 1890-91, c. 7, sec. 5. It is further provided that such mortgage so filed shall remain in full force and validity for the term for which it shall be given, and for sixty days thereafter, and that it "shall cease to be valid as against the creditors of the person making the same, and as against subsequent purchasers or mortgagees in good faith," after the expiration of said sixty days, unless before such expiration notice of foreclosure shall be given, or the mortgagee, his heirs or legal representatives or assigns, or the agent or attorney of the mortgagee or his assigns, shall make an affidavit exhibiting the interest of the owner and holder in such mortgage ²³⁶ and the amount yet due and unpaid of the money it may have been given to secure. This affidavit is required to be filed in all respects as the original mortgage. When so made and filed, the mortgage continues in force for one year after the term for which it was originally given; and a like affidavit may be filed within thirty days next preceding the

expiration of that year, which will continue the mortgage in force for another year; and within the same limitations and under the same conditions a like affidavit may be filed to renew the mortgage for each succeeding year thereafter, until the debt secured shall be fully paid: Laws 1890-91, c. 7, sec. 11. It is valid between the parties until the debt is fully paid, although neither filed nor renewed: Laws 1890-91, c. 7, sec. 10.

It is to be observed that nothing in the act qualifies or limits the term "creditors." Upon a literal construction the term embraces all creditors, antecedent as well as subsequent. A mortgage not filed as provided in the act is absolutely void "as against creditors of the mortgagor." One not renewed as required by the provisions of section 11 ceases to be valid "as against the creditors of the person making the same." The language seems to be plain and unequivocal. It is claimed, however, that when the statute is interpreted in the light of its object and policy, antecedent creditors must be excluded from its protection, as they could not be misled either by a failure to file or renew a subsequent mortgage, or to renew one already existing.

It is true that the object and policy of a statute may be resorted to in aid of interpretation. But when plain and unambiguous words or phrases are employed in an act, they should not be restricted in their operation by reference to the policy of the law, unless that policy is very clearly indicated in the act itself.

A noticeable distinction is made in the statute between creditors on the one hand and purchasers and mortgagees on the other. To render such distinction entirely clear, a repetition of words is employed. Both in section 5 and in section 11 the language is, "as against the creditors," ²³⁷ followed by, "and as against subsequent purchasers or mortgagees." Evidently the same class of creditors are intended to be and are covered in both sections. The word "subsequent" was not used to designate the protected creditors in either instance.

No doubt one of the objects of the statute was to protect persons extending credit to the mortgagor relying upon the freedom of his property from encumbrance as disclosed by the records; but we think the statute gives evidence of a broader policy than that, so far as creditors are concerned. As was said in a leading and ably considered case in New York: "It is impossible to say that only creditors who became such during the existence of the mortgage may be injured by keeping the

mortgage secret. It certainly is not improbable that in many cases antecedent creditors may be lulled into security and forbear the collection of their debts at maturity, by the apparent unencumbered possession and ownership by the debtor of property covered by an undisclosed mortgage": *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073.

There are numerous cases decided under similarly worded statutes holding that the notice which will subordinate a subsequent chattel mortgage to a prior one unfiled is not applicable to general creditors; and we believe that proposition to be well settled. A person accepting such a mortgage with notice of an existing one, although the latter has been withheld from record, is not a mortgagee in good faith, and is therefore not protected against the prior encumbrance. A creditor, on the other hand, is generally, at least, protected notwithstanding that he may have had similar notice. The cases announcing such a doctrine certainly do not restrict the policy of the statute to those creditors only who may have been misled by the silence of the public records: *Sayre v. Hewes*, 32 N. J. Eq. 652; *Farmers' etc. Co. v. Hendrickson*, 25 Barb. 484; *W. W. Kimball Co. v. Kirby*, 4 S. Dak. 152, 55 N. W. 1110; *American Loan etc. Co. v. Olympia etc. Co.*, 72 Fed. 620.

The decided weight of authority upon the question of ²³⁸ the interpretation to be accorded the term "creditors" in our chattel mortgage statute is against the contention of counsel for plaintiffs in error, and sustains the position that antecedent creditors are within the meaning and protection of the statute: *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073; *Campbell v. Richardson*, 6 Okla. 375, 51 Pac. 659; *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 311, 336; *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394; *National Shoe etc. Bank v. August*, 54 N. J. Eq. 182, 33 Atl. 803; *Clarkson v. McMaster*, 25 Can. Sup. Ct. 96; *Withrow v. Citizens' Bank*, 55 Kan. 378, 40 Pac. 639; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169, 48 N. E. 879; *Ledoux v. East River Silk Co.*, 19 Misc. Rep. 440; 44 N. Y. Supp. 489; *Farmers' etc. Co. v. Baker*, 20 Misc. Rep. 387; 46 N. Y. Supp. 266.

There are cases to the contrary, and counsel relies principally upon *Brown v. Brabb*, 67 Mich. 17, 11 Am. St. Rep. 549, 34 N. W. 403, and *Union Nat. Bank v. Oium*, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034. The question is discussed with much ability in both of those cases, and they are from courts which are entitled to our highest respect; but we are

not convinced by their reasoning. It seems to us unsound when attempted to be applied to a statute framed like our own with evident care, and by the employment of such language as is contemplated to relieve the legislative purpose from any doubt. The learned court in *Union Nat. Bank v. Oium*, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034, regards as anomalous the proposition that had the creditor accepted a mortgage as security for the payment of his debt, the unfiled mortgage would have constituted a superior lien, but that by refusing the mortgage he may attach and hold his lien as against such prior unfiled mortgage. We perceive no anomaly in the situation. A very natural distinction occurs to us between the creditor in such case with and without a mortgage. When he accepts a mortgage, he deals with the mortgagor, and has secured an interest in the property by the positive act of one who has already transferred an interest to another, and the creditor with notice so taking a mortgage is in a very different position from one who obtains his rights by the operation and by means of the machinery of the law, and upon whom, therefore, no duty rests to respect ²³⁹ the obligations of the owner as a mortgagor to his mortgagee. In the former case the lien is secured not by the act of the law, but that of the mortgagor: *Volckers v. Sturke*, 18 Misc. Rep. 457; 42 N. Y. Supp. 84.

In *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 336, the court said: "There is a distinction made in the statute between the creditors of the mortgagor and subsequent purchasers and mortgagees, with respect to the avoidance of the mortgage for neglect to file the same, or to take immediate possession. Purchasers or mortgagees, in order to take advantage of the failure of another mortgagee of chattels to comply with the statute, must be subsequent purchasers or mortgagees, taking their title under the mortgagor in good faith. . . . But no such qualifications apply as against the creditors of the mortgagor. Their rights may have accrued prior or subsequent to the mortgage, and yet they will be entitled to the benefit of the statute."

In *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11, Mr. Justice Peckham, in delivering the opinion of the court, said: "The failure to file the mortgage, there being no change of possession of the property mortgaged, rendered it void as against creditors then existing."

In the cases above cited the controversies arose out of a failure to file the original mortgage, but they are apt and in point,

as it is clear that creditors are alluded to in the same sense in both sections of the statute—that with reference to filing, and also that covering the renewal. The mortgage involved in the case at bar was filed, but not renewed. In addition to the authorities already referred to, the following uphold the right of prior creditors to take advantage of a default in filing a renewal affidavit: *Thompson v. Van Vechten*, 27 N. Y. 568; *Newman v. Tymeson*, 12 Wis. 448; *Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892; *Nix v. Wiswell*, 84 Wis. 334, 54 N. W. 620; *Burchinell v. Gorsline*, 11 Colo. App. 22, 52 Pac. 413; *Farmers' etc. Co. v. Baker*, 20 Misc. Rep. 387; 46 N. Y. Supp. 266; *Huber Mfg. Co. v. Sweny*, 57 Ohio St. 169, 48 N. E. 879. ²⁴⁰ If none is filed, the mortgage ceases to be valid "as against creditors of the person making the same." Antecedent creditors are included in that designation. Neither the policy nor object of the statute, as disclosed in its terms, requires or authorizes their exclusion.

A recent decision in Nebraska has come to our notice which apparently announces a contrary doctrine, but in that case the creditor had put himself in the position of a purchaser, and the cases cited in support of the court's statement were from Kansas and Wisconsin, both of which concerned subsequent purchasers and not creditors: *Arlington etc. Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677.

We are of the opinion that a chattel mortgage not renewed as required by law ceases to be valid as against creditors of the mortgagor, who became such before as well as after the default in renewal. This being so, are the creditors of the Ludvigsen estate in a position to take advantage of the failure on the part of the mortgagee to file the affidavit; and can the administratrix, in this case, urge the invalidity of the mortgage as against creditors in defense of her possession.

Counsel for plaintiffs in error contend that the only authority conferred upon an administrator to avoid a conveyance of the decedent is to be found in sections 9, 10, and 11 of chapter 16 of the act concerning probate procedure: Laws 1890-91, p. 287. Section 9 provides that when there is a deficiency of assets, and when the decedent, in his lifetime, has conveyed any real estate, or any right or interest therein, with intent to defraud his creditors, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same,

and may recover for the benefit of the creditors all such real estate so fraudulently conveyed; "and may also for the benefit of the creditors sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance."

²⁴¹ Section 10 provides that the executor or administrator is not bound to sue for such estate unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give security therefor as the court or judge shall direct. Section 11 directs that the proceeds of all goods and chattels, rights, and credits so recovered shall be appropriated in payment of debts of the decedent in the same manner as other property in the hands of the executor or administrator.

It is contended that there was no deficiency of assets at the commencement of the suit, as none of those who were creditors of the decedent in his lifetime had then filed their claims, and none had been allowed; and that the creditors referred to in said sections are those whose claims have been presented and allowed. It is supposed to follow from the inability of the administratrix to institute a suit to avoid a fraudulent conveyance in the absence of sufficient allowed claims to show a deficiency of assets, that she cannot hold personal property as against a fraudulent vendee, or successfully defend his suit for the recovery thereof unless at the time the vendee begins the assertion of his alleged rights a deficiency of assets is shown by reference to claims already allowed. It is also contended that the aforesaid sections of the probate act apply only to cases where a fraudulent intent on the part of the grantor existed at the time of the conveyance.

As a general rule, an administrator acquires no better title than the decedent had. It is also true, as a general rule, that without judgment or other legal process, or without a right by law to have the property of his debtor seized and sold for his benefit, a creditor is not in a position to assert his rights against a mortgage which is void as to creditors. He is not permitted to assail or question the validity of the mortgage until by judicial process or in some manner recognized by law the property has become bound for the payment of his debt, or, as one court has expressed it, until his debt is fastened on the debtor's property "by law, judicial process, or in some other way; for until his debt is so fastened, he has ²⁴² no right to or interest in his debtor's property, and cannot ask the court

to control its disposition, nor can he prevent the debtor from exercising full and complete dominion over it": *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571.

The question then arises whether the facts of this case place the creditors concerned in a position, or the administratrix as representing them or their interests, to assert any right to the property in controversy in opposition to the mortgage.

It is the duty of an executor or administrator to take into his possession all the estate of the decedent, real and personal, and to collect all debts due to the decedent or to the estate: Laws 1890-91, c. 70, subc. 16, sec. 1. All the property of the decedent becomes chargeable with his debts, and the same may be sold under the direction of the court or judge, in the manner prescribed by law; and there is no priority between personal and real property for that purpose: Laws 1890-91, c. 70, subc. 15, sec. 1. If an action is pending against the decedent at the time of his death, the claim upon which the action is brought must be presented for allowance in the same manner as other claims, and no recovery can be had in the action unless proof is made of the required presentation: Laws 1890-91, c. 70, subc. 14, sec. 11. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor, administrator, and judge; and the judgment must be that the executor or administrator pay the amount ascertained to be due, in the due course of administration: Laws 1890-91, c. 70, subc. 14, sec. 13. An execution cannot issue upon the judgment, nor does it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment: Laws 1890-91, c. 70, subc. 14, sec. 13. A judgment rendered against the decedent in his lifetime must likewise be presented for allowance, and no execution can issue thereon after his death, unless it be for the recovery of real or ²⁴³ personal property, or the enforcement of a lien thereon: Laws 1890-91, c. 70, subc. 14, sec. 14. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment, is not a lien on the real property of the decedent, but is payable in due course of administration: Laws 1890-91, c. 70, subc. 14, sec. 15. All demands against an estate of a deceased person are divided into certain classes, six in number, and no creditor of one class is permitted to receive payment until all those of the preceding classes are fully paid. If the

estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim: Laws 1890-91, c. 70, subc. 17, secs. 21, 23. The court is charged with the duty of making orders for the payment of the debts, as the circumstances may require; and if there are not sufficient funds to pay all the debts, the court must in the order specify the sum to be paid to each creditor: Laws 1890-91, c. 70, subc. 17, sec. 25.

No action is permissible upon any claim against an estate unless it is first presented, except that the holder of a mortgage or lien may bring an action to enforce the same against the property subject thereto, where all recourse against the property of the estate is expressly waived in the petition: Laws 1890-91, c. 70, subc. 14, sec. 9. Claims are required to be presented within the time limited by statute, or they become forever barred: Laws 1890-91, c. 70, subc. 14, sec. 1. The executor or administrator is entitled to the possession of all real and personal estate of the decedent. He is required to indorse upon claims presented to him his allowance or rejection. If rejected, suit may be instituted within a time limited by statute, but as aforesaid the judgment in such suit will establish only the correctness of the claim.

From these provisions it is apparent that a creditor after the death of his debtor is prevented from securing through legal process a specific lien upon his property; but the entire property of the estate becomes chargeable with the debts, funeral expenses, family allowances, and expenses of administration. The rights and interests of the creditors ²⁴⁴ are to be determined and satisfied in the administration proceedings in the court. The court having jurisdiction thereof is the district court, which is a court of record and also of general jurisdiction. The legal effect of the statutory provisions seems clearly to be to render the property of the estate bound for the payment of debts, so far as it will go. The supreme court of errors in Connecticut, in considering an application of a receiver of an insolvent corporation to have determined the rights of certain creditors who as conditional vendors claimed title to certain machinery in the receiver's possession, and in determining the rights of the general creditors as against such conditional contracts which were void as to creditors, but good as to the corporation, and therefore, as contended, against the receiver, held that the receiver was not alone the representative of the corporation, but also of the creditors, and respecting the right of the

general creditors and their representative, the receiver, to question the conditional sales, said:

"By the appointment of a receiver the rights of creditors to attach or levy upon such property are suspended. The law thus disables the creditors from interfering with the property, or from in any way appropriating it for their sole benefit; but in so doing it does not lessen their rights with respect to such property, nor does it destroy them; it merely provides for their protection and enforcement in another way. And whenever the law thus disables creditors from helping themselves, whether by proceedings in bankruptcy or insolvency, or by the appointment of a receiver or otherwise, it provides for the enforcement of whatever rights they may possess against the property of the debtor, through the instrumentality of its agent, the trustee, assignee, or receiver. For the purpose of enforcing any such right which the creditor could have enforced for his sole advantage, and for the purpose of holding or taking any property which a creditor could hold or take by law, or for recovering back any property ²⁴⁵ of which a creditor could avail himself in payment of his debt, the trustee, assignee, or receiver is in effect the creditor. . . . It is of no importance, so far as the present discussion is concerned, whether such agent of the law takes the technical title to the debtor's property, or takes only the possession of it; in either case he is the sole agent through whom, and through whom alone, as a general rule, the rights of creditors can be protected and enforced, and in protecting and enforcing those rights he is the representative of the creditors, and not of the debtor": *In re Wilcox & Howe Co.*, 70 Conn. 220, 39 Atl. 163.

In *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571, where the contest was between the holder of a chattel mortgage void as to creditors and a receiver of the corporation mortgagor, the court held that the moment the corporation was adjudged to be insolvent and a receiver appointed to wind up its affairs, the legal effect of the statute which regulated such matters was to fasten the debts of the corporation upon its property. The court said: "From that time forth its property is, by law, appropriated exclusively and irrevocably to the payment of its debts. Power is conferred upon its receiver to take possession of all its property and convert it into money, to the end that the money thus obtained may be distributed among its creditors. No other application or disposition can be made of the money realized from its property. It must be paid to

creditors, and in distributing it among unsecured creditors, the statutory direction is that they must be paid in proportion to their respective debts. By an enactment expressed in this form, the debts of an insolvent corporation are, in my judgment, just as plainly and effectually fastened on its property as they would have been had the statute said, in direct terms, that when a corporation is adjudged to be insolvent its property shall at once become liable for the payment of its debts. A legislative declaration, in the form just stated, has been ²⁴⁶ held sufficient to fasten the debt of a creditor at large on the lands of his deceased debtor": *Haston v. Castner*, 31 N. J. Eq. 697.

In connection with the above statement, quoted from the decision of *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571, it will be observed that our statute declares that all property of the decedent shall be chargeable with his debts.

While there are occasional decisions to the contrary, the clear weight of authority sustains the right of an assignee or receiver in insolvency to avoid a chattel mortgage on the ground of its invalidity as against creditors for noncompliance with statutory regulations: *Farmers' etc. Co. v. Minneapolis etc. Works*, 35 Minn. 543, 29 N. W. 349; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Farmers' etc. Co. v. Baker*, 20 Misc. Rep. 387; 46 N. Y. Supp. 266; *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394; *Morris v. Ellis*, 16 Ind. App. 679, 46 N. E. 41; *Withrow v. Citizens' Bank*, 55 Kan. 378, 40 Pac. 639; *First Nat. Bank v. Salyer* (Okla., July, 1897), 50 Pac. 77; *Ruggles v. Cannedy* (Cal., June, 1898), 53 Pac. 911; *Hanes v. Tiffany*, 25 Ohio St. 552; *Putnam v. Reynolds*, 44 Mich. 113, 6 N. W. 198.

In *Withrow v. Citizens' Bank*, 55 Kan. 378, 40 Pac. 639, the court said: "The statute declares the unrecorded mortgage void as against the creditors. It is therefore void as against an assignee who is the representative of all of them."

In the cases maintaining this doctrine, in the case of an assignee, the decisions, generally at least, rest upon the fact that the assignment is controlled and regulated by statute, and the assignee administers the trust under the direction of the court for the benefit of all creditors, thus distinguishing them from the case of an assignee under a common-law assignment, the common law denying to such an assignee any better standing than his assignor had. Judge Cooley, however, suggests another distinction which arises between a mortgagee whose invalidity arises from the fraud of the mortgagor and one becom-

ing void by the neglect of the mortgagee, and in this connection he says: "The assignee is not a purchaser for value, and not a creditor; and even creditors, it is said, cannot ²⁴⁷ attack the mortgage except indirectly through a seizure of the property by attachment or other suitable process. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor, but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned. It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control": Putnam v. Reynolds, 44 Mich. 113, 6 N. W. 198.

We are not considering the case of an assignee, and whether or not under our statute regulating voluntary assignments an assignee would possess the right, as representative of the creditors, to assail a mortgage void for want of filing or renewal is a question not before us, and is not decided. The cases cited upon this point, however, are persuasive, to say the least, upon the question which is before us, as the right of the assignee to attack such a mortgage has been determined upon principles clearly applicable to this controversy, and our statutes governing the administration of estates of decedents. The precise question under consideration has been passed on in at least three cases, and it has been held that an administrator, as a representative of the creditors of the estate, occupies the same position as the creditors themselves in respect to the avoidance of a mortgage void because not filed or renewed: Currie v. Knight, 34 N. J. Eq. 485; Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Becker v. Anderson, 11 Neb. 493, 9 N. W. 640. See, also, Buehler v. Gloninger, 2 Watts, 226; McLean v. Weeks, 61 Me. 277.

In an able and exhaustive opinion the court in Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741, held that where a chattel mortgage is declared void by statute as against the creditors of the mortgagor, and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor, whose duty as well as ²⁴⁸ right it is to defend his possession against the claim of the mortgagee notwithstanding such mortgage was valid as against the mortgagor. The statutes of Ohio did not contain as many provisions as are found in our own declaring and emphasizing the principle

that the claims of all creditors are to be satisfied out of the estate through the course of administration provided for by law, but under their statute all goods and chattels were to be deemed assets to be administered by the personal representative, and the proceeds thereof were to be applied to the payment of debts in a certain order of preference. In the course of the opinion the court said: "The creditors of a mortgagor do not cease to be such by his death; and so long as they continue to be such creditors such mortgage is void as against them. By relation, the executor or administrator of the mortgagor became trustee for the creditors from the death of the mortgagor."

The action in that case was brought to enforce a chattel mortgage lien upon property in the possession of an executor.

In New Jersey the statute declared that in case the estate of a testator or intestate should be insufficient to pay all his debts, the same should, after the satisfaction of certain preferred debts, be distributed ratably among his creditors. It was also provided that no execution should issue upon a judgment recovered against the executor or administrator of an insolvent estate. It was held that the fundamental purpose of the statute was to appropriate exclusively and irrevocably the property of a decedent to pay his debts, and that creditors at large of an insolvent estate could challenge the validity as to them of a chattel mortgage, and at the suit of such creditors a sale under the mortgage was enjoined.

Our own court has decided that a general creditor has sufficient interest in the estate of a decedent to inquire into the legality of the proceedings leading up to a judgment against the administrator, and the judgment itself, ²⁴⁰ as such general creditor is directly interested in the distribution of the assets of the estate: *O'Keefe v. Foster*, 5 Wyo. 343, 40 Pac. 525.

A similar decision in New Jersey (*Milnor v. Milnor*, 9 N. J. L. 93) was referred to in *Currie v. Knight*, 34 N. J. Eq. 485, as supporting the proposition announced in that case.

In none of the cases cited involving the right of an assignee, receiver, or representative of the insolvent estate of the decedent was the fact deemed material that the creditors had not secured a specific lien by judgment or process. There could be no specific lien, because by the operation of law the creditors were denied a remedy of that character; but their rights were provided for in other ways just as completely, and under forms of law just as legal, with the exception that every creditor stood upon the same footing, and no individual creditor could

by the exercise of diligence appropriate the property to his sole advantage.

In *Ruggles v. Cannedy* (Cal., June, 1898), 53 Pac. 911, the California court alluded to the fact that the creditors had not obtained judgments against the mortgagor nor instituted proceedings therefor at the time he was adjudged insolvent, and remarked that after that time they were by force of the insolvency act prevented from resorting to any proceedings in law or equity for such purpose, and were limited to the presentation of claims to the insolvency court. They did that, and the court held that while not in strictness a judgment, the allowance of a claim had much the same force and effect, and amounted to the only thing in the nature of a judgment which the creditors so situated could obtain, and was equivalent to a judgment for the purpose of enforcing their rights against fraudulent or void acts of the insolvent.

The cases thus maintaining the right of an assignee, receiver, and executor, or administrator of an insolvent estate, as representing the general creditors, to avoid in their interest a fraudulent or void chattel mortgage, we think correctly present the law upon the question. The ²⁵⁰ doctrine is supported by sound reason, and comports with our ideas of justice in the premises. The mortgage is without validity as to the creditors. As against them, it is no mortgage and represents no interest in the property. Possibly they might, and especially if the administrator should refuse to act, institute proceedings in their own behalf to require the property or its proceeds to be devoted to the purposes of the administration of the estate.

We are convinced that the administratrix represents the creditors of this insolvent estate, and as such representative is not affected by the fact that the mortgage was valid against the decedent. Our statutes confine the creditors in the collection of their debts to the administration proceedings. The theory that the administrator represents the creditors affords the only reason for the provisions heretofore referred to relative to the cancellation of void or fraudulent conveyances.

As no affidavit of renewal was filed and no notice of foreclosure given, the mortgage was void as against the creditors of the mortgagor.

We come now to consider the effect which should be given the fact that none of the creditors of the decedent had presented their claims and secured the allowance thereof prior to the commencement of the action.

It may be that section 9 of subchapter 16 of the probate act applies only to such conveyances made by the decedent as were void or fraudulent at the inception of the conveyance. Such seems to have been the view in California, from which state the probate chapter was taken: *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879. Although in *Murphy v. Clayton*, 114 Cal. 526, 43 Pac. 613, that court assumed, for the purposes of the case, without deciding, that it applied to transfers void as to creditors under other statutory provisions. In adopting the section which was borrowed entire from the California statutes, the prior construction thereof by the courts of that state were, under a familiar rule of construction, also adopted. In *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244, decided September 10, ²⁵¹ 1890, a few months anterior to the enactment of the law in this state, in a case where a creditor of an estate filed a petition asking for an order directing the administratrix to allow her name to be used in an action to be brought to set aside an alleged fraudulent conveyance of the decedent, the order was made as prayed for and the administratrix took the case to the supreme court. The creditor filing the petition had in due time presented her claim, which was rejected by the administratrix, and suit was brought thereon which was still pending when the original case above cited was decided. The court held that the administratrix had no right to bring an action to set aside a deed of her intestate void as to creditors unless there is a deficiency of assets, and there are creditors for whose benefit the property so recovered must be sold; and that to constitute one such a creditor his claim must have been allowed by the administrator or evidenced by a judgment. This holding was followed in *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323, and it was said: "The obvious intent and meaning of this section is that two things must occur to authorize the administrator to commence an action to set aside a deed of his intestate as void as against creditors: 1. There must exist creditors to be paid; and 2. There must be an insufficiency of assets in the hands of the administrator to meet their demands. Both of these facts must coexist to bring the case within the limitations of the statute."

To the extent of the decision in *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244, we must consider ourselves bound by the construction placed upon the statute. We are the more willing to accept that construction as we agree with it. Evidently one is not a creditor until his claim

is allowed or judgment obtained within the meaning of section 10, which relieves the administrator of the duty to bring the action unless application therefor is made by creditors.

In the case of *Murphy v. Clayton*, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460, an action was brought to recover possession of personal property from an administrator ²⁵² by one who claimed them by purchase from the decedent in his lifetime. As to some of the property the trial court found the transfer to have been void as to creditors. The court also found that the time for the presentation of claims against the estate had not expired, but that a certain amount of claims had been allowed; as to others, suits were pending, and as to certain property, suits were also pending which, if successful, would reduce the value of the estate subject to the payment of debts. Upon the findings, however, it was not disclosed that the estate was clearly shown to be insolvent, and there was no direct finding of insolvency. Judgment for the administrator was reversed, the supreme court holding that if the administrator would not have been authorized to prosecute an action to recover the property upon the facts as shown under the decisions in *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323, and *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245, 26 Pac. 244, such facts would not constitute a defense to the action brought by the alleged fraudulent vendee to recover it from the administrator. This case was decided in 1896, and is therefore not controlling, even if in point, unless it appeals to our judgment as sound, and based upon satisfactory reasoning. Chief Justice Beatty and Mr. Justice Van Fleet dissented. The dissenting justices repudiated the proposition that if the administrator could not sue he was in no position to defend; and said, in substance, that when he has property in his possession which was in the possession of the intestate at the time of his death, it is his duty to retain it until it appears that it will not be needed; and that the position of the party attempting to deprive the administrator of assets is no better than that of an heir with respect to unsold property of the estate. That it is his, if not needed for the payment of debts, and like the heir, he should wait until that fact is ascertained. But the case is distinguishable from the case at bar; and from all that was said in the prevailing opinion, it does not follow that upon the facts before us the California court would deem the case controlling. There, upon the trial, ²⁵³ the insolvency of the estate was not established. For all that appeared it may not have been in-

solvent. In the present contest, it is admitted that the estate was insolvent, and was so insolvent at the time of the death of the decedent. Enough claims had been allowed before trial, although subsequent to the commencement of suit, to conclusively prove the fact of such insolvency. The value of the estate is not mentioned in the agreed statement, but it is alleged therein and agreed that the property of the estate, including that in controversy, is not sufficient to pay the debts.

In *Kilbourn v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741, the court said: "It is one thing for the representative of an estate to pursue, by action at law, the fraudulent vendee of the deceased fraudulent debtor for the recovery of goods fraudulently transferred; while it is quite a different thing for such executor in possession to defend, for the sole benefit of creditors, such possession against a claim which by statute is declared absolutely void as against creditors."

In *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323, the denial of the right of the administrator to maintain the action was based upon the allegations of the complaint, which were in substance that the time for the presentation of claims had not expired, and the plaintiff was informed and believed that there were creditors whose claims had not yet been presented, and the amounts thereof were unknown to the plaintiff. It was held that the demurrer to the complaint should have been sustained.

It is not necessary that we decide whether, if at the trial it had not appeared that by reference to the claims then allowed the estate was insolvent, the administratrix would have been entitled to prevail in the action, nor to hold that she would have had the right to the possession until the expiration of the period for the presentation of claims.

Sufficient claims had been presented before trial, and the estate was shown, or rather admitted, to be insolvent. We are not unaware of the principle that under our ²⁵⁴ statutes in a case of this character the respective rights of the parties are to be determined as at the commencement of the suit.

The facts upon which the right of the administratrix to retain possession of the property from the mortgagee depended was that the estate was insolvent, and the property was needed to pay debts. That fact, as admitted and shown by the agreed statement, existed at the commencement of the suit. It is true that the fact was not ascertained in a conclusive manner, nor so as to be considered by the courts in a legal proceeding, until the claims were presented and allowed; but when so allowed

they furnished evidence upon the fact of insolvency existing at the time that the action was brought.

No doubt a creditor without judgment or process in case of a living mortgagor, or without an allowed claim, or one established by judgment, in case of a deceased mortgagor, is not in a position to attack a void mortgage; and had Ludvigsen in his lifetime, before the creditors had obtained judgment and execution, or any lien on the property, made a bona fide transfer of the property to the mortgagee in payment of the mortgage, the remedy of the creditors would have been defeated. The administratrix, however, in view of her duties and responsibilities, and the fiduciary nature of her office, could not act with the freedom of her intestate, and transfer the property to the mortgagee liberated from all claims and remedies of creditors. The bank does not put forth a claim of absolute title, but asserts a partial ownership—a lien by mortgage. Herein also his case differs from the facts in *Murphy v. Clayton*, 114 Cal. 526, 43 Pac. 613, 46 Pac. 460. The determination of the right of the mortgagee to the property, if asserted in the administration proceedings, for example, in the course of distribution of the proceeds of the estate among creditors, and a preference under sections 21 and 22, subchapter 17, should be claimed for the mortgagee, would involve the rights of all parties, creditors, legatees, and heirs. The court, in such a proceeding, would certainly not ²⁵⁵ award a preference to the mortgagee in advance of the time or expiration of the time for filing claims on the ground that at the time of the application sufficient claims had not been allowed to indicate insolvency.

Had the mortgagee brought suit of foreclosure, and at the trial it was shown by the administratrix in defense what is shown in this case, the mortgage being void as to creditors, it will hardly be contended, having regard to the representative character as to creditors of the administratrix, that a decree could be properly entered foreclosing the mortgage for the benefit of the mortgagee. It would in such case have made no difference that the claims of the creditors had not been allowed until after the institution of the suit.

Does not the case at bar have the same effect as an action to foreclose? The mortgagee is entitled to possession, if at all, for but one purpose; and that is to foreclose the mortgage by a sale of the property. If the mortgage is void as to the creditors of this estate, and we hold that it is; if the administratrix represents the creditors and can assail the mortgage as such

representative, and we hold that she can—then the judgment awarding the right of possession to the mortgagee, on the ground that at the commencement of the suit there were no allowed claims, and therefore no creditors within the meaning of the law, would amount to conferring upon the mortgagee a possession which can legally be of no benefit to it, because its power of foreclosure and sale, as to creditors, has ceased. Such an anomalous result should be avoided if it can be done without violence to well-settled legal principles. We are of the opinion that it can be avoided, and that no doctrine in the law will be thereby distorted or violated.

If the estate was insolvent, and the property in controversy at the commencement of the suit was required for the payment of debts, the plaintiff was not entitled to possession. The facts show such insolvency, and indeed it is admitted. It matters not that the proof thereof depends upon the allowance of claims subsequently.

²⁵⁶ Upon the trial, the district court must have found upon the evidence, which is disclosed in the agreed statement, that the mortgage was void as against creditors; that the property of the estate was insufficient to pay its debts; that the estate was insolvent at the commencement of the suit, and the property in question was needed for the payment of the allowed claims. All of these are facts, and conceded facts. They certainly could not sustain a judgment for the mortgagee, awarding to it the possession of the property.

We do not think the position taken by counsel for plaintiffs well taken or supported by authority. Nor do we think that the provisions of section 2 of subchapter 16 of the probate act affects this case. That section declares that actions for the recovery of any property or the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators and intestates. This section was not intended to interfere with the rights of creditors, much less to destroy them. It must be construed in the light of the other provisions of the chapter. One only need be restated, viz., that all the property of the decedent shall be chargeable with the payment of his debts.

For the reasons given, we are of the opinion that there is no error in the record, and the judgment must be affirmed.

Corn and Knight, JJ., concur.

CHATTEL MORTGAGE—RECORDING.—A CREDITOR, within the meaning of a statute declaring mortgages of personal property void as against creditors of the mortgagor unless recorded, is one who becomes such after the mortgage is executed: *Union Nat. Bank v. Oium*, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; *Brown v. Brabb*, 67 Mich. 17, 11 Am. St. Rep. 549, 34 N. W. 403.

ESTATE OF DECEDENT.—WHERE A CHATTEL MORTGAGE is declared void by statute as against creditors of the mortgagor, and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator, whose duty and right it is to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor: *Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741.

RAMSEY v. JOHNSON.

[8 Wyo. 476, 58 Pac. 755.]

ASSIGNMENTS — RENT — RIGHTS OF ASSIGNEE.—Rent due and accrued for a certain year out of a term of years may be assigned without an assignment of the lease, and the assignee need not allege an assignment of the lease in an action to recover the rent assigned.

ASSIGNMENTS—RENT—LIEN—RIGHTS OF ASSIGNEE.—An assignment of the lease is not essential to enable the assignee of rent due and accrued to enforce a lien upon leased personal property, provided by the lease as security for the rent.

ASSIGNMENTS — RIGHTS AND REMEDIES OF ASSIGNEE.—An assignment of a debt carries with it every remedy and security available to the assignor as incident thereto, although they are not specifically named in the instrument of assignment.

LIENS—PLEADING.—As against one who has given a lien upon property to secure a debt, due or to become due, it is not necessary in a suit to foreclose the lien to allege ownership in the property of the debtor.

PLEADING—REPETITION OF CAUSE OF ACTION.—In stating several causes of action, it is not necessary to repeat every general averment essential to each or common to all, but as to such matters reference may be made to distinct allegations in a preceding cause of action, thereby incorporating them in a subsequent cause of action and avoiding useless repetition.

PLEADING—REPETITION OF CAUSE OF ACTION.—In an action to recover a personal judgment for rent accrued and due, and to enforce a lien securing it, both the debt and the lien arising under one written instrument, if the execution of the contract is fully alleged in the first cause of action, which is based upon the indebtedness, its execution is sufficiently referred to in a second cause of action based upon the lien by stating that the lien was agreed upon between the parties under the terms and conditions of said agreement of lease.

E. E. Enterline and D. A. Reavill, for the plaintiff in error.

⁴⁷⁷ POTTER, C. J. Plaintiff in error files a petition for rehearing, setting forth the following reasons therefor: 1. That the court erred in its statement of facts in stating that the petition set out an assignment of the lease, and in stating that the petition alleged that by the terms of the lease there was a lien upon certain personal property upon the premises, and belonging to the defendant, to secure the payment of the sum claimed to be due; 2. That the court erred in holding that reference could be made to the first cause of action to supply material facts omitted in the second cause of action, and in holding that the second cause of action contained a sufficient statement of facts; 3. That the court erred in holding that reference is made in the findings to the lease described in the pleadings; 4. That the court erred in holding the findings sufficient to support the judgment; 5. That the court erred in affirming the judgment.

It is contended that the petition is insufficient because it did not allege an assignment of the lease, and that this court in its former opinion erroneously recited such an assignment. The recitation of such fact in the opinion may not have been accurate, and probably was not; but ⁴⁷⁸ it is entirely immaterial. The plaintiff was not required to plead an assignment of the lease, nor to prove it. The lease itself may not, as a matter of fact, have been assigned. The first cause of action is founded upon a claim for rent of certain premises due and accrued under the terms and agreements of a contract of lease alleged to have been executed between the plaintiff in error and one William A. Johnson. It is alleged that, "after said amount became due and payable to the said William A. Johnson, as above set forth, and prior to the commencement of this action, the said William A. Johnson sold, assigned, and transferred to the plaintiff all of his right, title, and interest in and to said amount, and the right to receive the same from the defendant, for a good and valuable consideration, and that the plaintiff is now the real party in interest in this action."

That averment is clearly sufficient to show the right of the plaintiff to recover the amount alleged to have become due, and the assignment of the lease was not essential to her right. The lease was made in December, 1893, and by its terms was to run for seven years. The amount sued for was the rent for the year 1895. There may well have been an assignment of the rent due and accrued for that year without a transfer of the lease.

By the second cause of action it is sought to enforce a lien upon certain personal property upon the leased premises claimed to be provided by the lease as security for the fulfillment of its conditions.

As to that matter, or right, also, no specific assignment of the lease is required. It is a familiar rule of law that an assignment of a debt carries with it every remedy and security for such debt available to the assignor as incident thereto, although they are not specifically named in the instrument of assignment: 2 Am. & Eng. Ency. of Law, 2d ed., 1084; *Graham v. Blinn*, 3 Wyo. 746, 30 Pac. 446.

It is further insisted that the petition contained no averment that the property charged with being subject to the lien belonged to defendant. There is no direct allegation ⁴⁷⁹ of that fact in the petition. The trial court, however, so found. But that it did belong to the defendant is necessarily to be inferred from the other allegations. It is averred that the property is on or near the leased property, in the possession of defendant, and that the latter has no other property, etc. It is also stated that defendant had already disposed of a part of the property covered by the lien, and a fear that he will dispose of the remainder is alleged as ground for the appointment of a receiver which is prayed for.

But an allegation that defendant owned the property is not essential. As against one who has given a lien upon property to secure a debt due or to become due from him, we know of no rule requiring an allegation of ownership in the debtor in a suit to foreclose or enforce the lien. There does not appear to be other claimants, and as against plaintiff in error (defendant below), so far as the petition is concerned, it is sufficient to presume that he agreed to a lien upon property belonging to himself.

Regarding the second ground for the rehearing, it will be well to say, in the first place, that the court in its former opinion did not hold that reference could be made to the first cause of action to supply material facts omitted in the second cause of action. The second cause of action was held sufficient, and we did hold that it was unnecessary to repeat the allegations contained in the first cause of action respecting the execution of the lease, but that the averment that "under and by the terms and conditions of said agreement of lease, it was agreed," etc., was sufficient. This was so held on the ground that clear and distinct reference is made to the agreement already set out in

the petition, and that such a reference is permissible. This reaches the principal objection which counsel urges against the petition. The allegation of the cause of action assailed is in substance that "under and by the terms and conditions of said agreement of lease," it was agreed that the personal property and improvements on said property should be held as security for the ⁴⁸⁰ fulfillment of the conditions of said lease. It is insisted that the allegation is insufficient, because the execution of the agreement of lease is not again specifically averred.

Counsel rests his contention upon the general rule, which is well settled, that each cause of action must be complete in itself; and he relies upon the statement and interpretation of that rule found in Bliss on Code Pleading and in Pomeroy's Remedies and Remedial Rights. It may be seriously questioned whether either of the authors named intended to give such a narrow interpretation to the rule as must be given to it, if counsel's application of it is to be sustained.

At common law, different counts in a declaration are treated for all purposes as distinct as if they are separate declarations, and unless a second count expressly refers to the first, no defect therein will be aided by the preceding count. But it is essential that unnecessary repetition be avoided, and the approved practice at common law is by an inducement in the first count to apply any matter to the following counts, and to refer in the subsequent counts to such inducement, thus avoiding unnecessary prolixity: 1 Chitty on Pleading, 16th Am. ed., 429. And it is held that at common law an express adoption in a second count of all the allegations of the first is permissible, although the practice is not commended: Florida etc. R. R. Co. v. Foxworth, 41 Fla. 1, 79 Am. St. Rep. 149, 25 South. 338. See, also, Dent v. Scott, 3 Har. & J. 28; Freeland v. McCollough, 1 Denio, 414, 43 Am. Dec. 685; Crookshank v. Gray, 20 Johns. 344.

Under the code system of pleading the prevailing judicial opinion is that in stating several causes of action it is not necessary to repeat every general averment essential to each or common to them all, but that as to such matters reference may be made to distinct allegations in a preceding cause of action, thereby incorporating them in a subsequent cause of action and avoiding useless repetition: Kinkead's Code Pleading, sec. 20; Phillips on Code Pleading, sec. 203; Jasper v. Hazen, 2 N. Dak. 401, 51 N. W. 583; Simmons v. Fairchild, ⁴⁸¹ 42 Barb. 404; Yost v. Commercial Bank, 94 Cal. 494, 29 Pac. 858; Green v.

Clifford, 94 Cal. 49, 29 Pac. 331; Eldridge v. Hargreaves, 30 Neb. 638, 46 N. W. 923; Leavenworth etc. Ry. Co. v. Wilkins, 45 Kan. 674, 26 Pac. 16; Stone v. Wendover, 2 Mo. App. 247; Ward v. Kelly, 7 Mo. App. 565; Aulbach v. Dahler (Idaho), 43 Pac. 322.

In Pomeroy's Remedies and Remedial Rights, at section 575, it is conceded that the general rule, requiring each count to be complete in itself, applies only to the material and issuable facts which constitute the gravamen of the cause of action, and not to matter which is merely introductory, or alleged by way of inducement; and while the exception is not stated so positively by Bliss in his text, it is conceded to be recognized in some states: Bliss on Code Pleading, sec. 121.

In Phillips on Code Pleading, supra, a recent work, it is said: "But the maxim that words in one instrument may be incorporated in another by reference—*Verba relata inesse vident*—applies to the separate divisions of a pleading; and statements in one cause of action may be incorporated in another by apt words of reference and adoption therein."

In Nebraska the principle is stated as follows: "An allegation in one count may be referred to in any subsequent count and made a part thereof by reference, and the allegation referred to will be considered in construing each subsequent count. . . . Any other rule would require unnecessary repetition": Eldridge v. Hargreaves, 30 Neb. 638, 46 N. W. 923.

The case of Haskell v. Haskell, 54 Cal. 262, has been occasionally cited as announcing a contrary doctrine, and it is relied on by counsel. The same may be said of Pennie v. Hildreth, 81 Cal. 131, 22 Pac. 398.

But that the cases are not hostile to the prevailing doctrine and have been misunderstood, is shown in the case of Green v. Clifford, 94 Cal. 49, 29 Pac. 331, where it is said: "It has never been the settled law here that the preliminary averments of a complaint can never be made part of subsequent ⁴⁸² counts by apt and express reference, and without being rewritten," and "of course each count must stand by itself; but it is not fatally defective because it incorporates by reference certain general averments which are in the same pleading, and which are necessary to all the counts, if the reference be so plain and explicit as to leave no doubt as to the meaning." The court in that case does not commend that method of pleading, but say that "it is not bad enough to upset a judgment."

The conclusion arrived at in *Aulbach v. Dahler* (Idaho), 43 Pac. 322, by the supreme court of Idaho, is stated as follows: "When several causes of action are united, it is not necessary to rewrite in each count after the first all common allegations, but it is sufficient if apt and express reference is made in each subsequent count to the preliminary allegations stated in the first, thus making them a part thereof."

In the case at bar the allegation that the lease was executed by and between the defendant and William A. Johnson is common to both causes of action, and is clearly to be considered a preliminary averment. The respective agreements furnishing the basis for the claim of money due, set up in the first cause of action, and the claim of lien sought to be enforced by the second cause of action, are found in the same written instrument—the lease—the due execution of which is alleged in the first cause of action. To require the rewriting in the second count of that allegation would seem to require unnecessary, not to say useless, repetition.

We think the reference is plain and distinct. It is alleged to have been agreed, etc., "under the terms and conditions of said agreement of lease." But one such agreement is set out in the petition. It is not possible to mistake the meaning or reference.

In *Yost v. Commercial Bank*, 94 Cal. 494, 29 Pac. 858, it was held that where a note and mortgage are fully set out and described in one defense of an answer, they may be referred to in a separate defense as having been set out in the preceding ⁴⁸³ defense, without the necessity of repetition of their contents.

In *Beckwith v. Mollahan*, 2 W. Va. 477, it is held that a reference to allegations in a preceding cause of action by the words "as aforesaid" is sufficient if the matter so referred to is thereby plainly identified. The words "on the day and year and at the place last aforesaid" have been held to amount to a sufficient reference: *Rathbun v. Emigh*, 6 Wend. 407.

The addition of the words "executed as aforesaid," or "executed as set forth in the first cause of action," would probably have been nicer pleading, but we do not think that without them the reference in this case is insufficient. The agreement as to lien is averred to have been made between the defendant and William A. Johnson, thus further identifying the particular lease already set out in the first cause of action.

In a suit of this nature—to recover a personal judgment for rent accrued and due, and to enforce the lien securing the same, both the debt and lien arising under the same written instrument—we think that where the execution of the contract is fully alleged, as in this case, in the first cause of action, which is based upon the indebtedness, its execution is sufficiently referred to in a second cause of action based upon the lien by a reference such as appears in the petition under consideration.

Were we wrong in this conclusion there would exist no reason for reversing the judgment upon the ground of the objection urged, in view of our statute which requires the court in every stage of an action to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party: Rev. Stats. 1887, sec. 2502; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612. The pleading complained of clearly refers to a particular contract, which has been set out in a preceding cause of action, and if it had not been executed, it could not have been agreed between the parties named as therein alleged.

⁴⁸⁴ The remaining contention of counsel has reference to the findings. We see no reason to change our views as announced in the former opinion in respect to them. The matter is sufficiently discussed in that opinion and requires no further elaboration.

We are of the opinion, upon re-examination of the question, that the findings are sufficient to support the judgment.

Rehearing denied.

Corn, J., concurs.

Knight, J., did not sit.

ASSIGNMENT OF RENT.—Covenants for the payment of rent pass to an assignee of the rent without the aid of any reversion in the assignee. And the assignee has such an interest in the land as is necessary to give him all the remedies of the lessor against the lessee. He may maintain an action for the rent accruing after the assignment because the privity of contract is transferred: See note to Childs v. Clark, 49 Am. Dec. 170.

BIG GOOSE AND BEAVER DITCH CO. v. MORROW.

[8 Wyo. 537, 59 Pac. 159.]

WATERS AND WATER RIGHTS—DITCHES—DUTY TO GUARD.—A ditch owner who acquires his right of way while the land is public must, nevertheless, provide reasonably adequate safeguards and barriers to prevent the livestock of an owner of land crossed by such ditch from falling into a dangerous washout, caused by the action of the water carried in such ditch. A failure to perform such duty renders the ditch owner liable in damages.

WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER.—It is the duty of a ditch owner to protect his ditch so that it will not interfere with an owner whose land it crosses and the latter's enjoyment of his premises, to any greater extent than that reasonably justified by the easement, and it is not material that the washing done by such ditch is no greater than is done in other cases of water similarly conducted, nor that it may have been impracticable to build a flume, or that another or longer course would have been altogether too expensive and inconvenient.

WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER TO GUARD.—A ditch owner has the right to adopt and employ a natural draw or gulch as a part of his ditch system, but if a dangerous washout or excavation results therefrom, the ditch owner must guard and protect it, and make reasonably adequate provision to prevent animals rightly upon the land from falling into it.

WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER TO SUBSEQUENT SETTLER.—The right of way accorded to a ditch owner over public lands must be held to be acquired with the knowledge and upon the understanding that the land itself remains open for settlement subject only to such right of way, and the reasonable enjoyment thereof, and the owner of such right of way must furnish and maintain reasonably adequate safeguards or protective appliances against injury to the subsequent settler upon the land.

NEGLIGENCE—PROXIMATE CAUSE.—It is the duty of a ditch owner to properly guard a dangerous excavation caused by the wash of his ditch so as to prevent animals rightly upon the land from falling therein, and the fact that animals injured by falling into such excavation are driven toward the ditch by a snow-storm does not relieve him from liability, as his negligence, and not the storm, is the proximate cause of the injury.

JUDGMENTS—COSTS LEFT BLANK.—A judgment for a certain amount and costs taxed at blank dollars is not void as to the costs, which may be subsequently taxed and inserted by the clerk of the court.

E. E. Lonabaugh, for the plaintiff in error.

Appelget & Mullen, for the defendant in error.

540 **POTTER, C. J.** Plaintiff in error is a ditch corporation engaged in diverting water, and conducting it upon or to the neighborhood of lands of its stockholders for irrigation. For

the purpose of conveying the water across certain lands of the defendant in error, it employed and adopted, as part of its ditch, a natural depression, draw, or gulch situated on said lands, through which it was unnecessary to resort to excavation, although, as we understand the testimony, the defendant in error, who was a stockholder in the company, had plowed for his own advantage, or caused to be plowed, a few furrows to confine the water, and prevent its spreading, as it threatened to do, over more land in width than was desirable. The water is turned loose into said draw or gulch at a point near the place where it enters the lands of defendant in error, and follows it for a distance of fourteen hundred feet, where it is recaptured in a ditch constructed for that purpose. It is carried in that ditch upon said lands until another draw or gulch is reached, where it is again turned loose, and discharged into said second draw, down which it flows until it passes off from the lands of defendant in error. In some instances the witnesses testifying by reference to a certain map before them, and which is in the record, pointed out or indicated the locations and directions, accompanying their signs by such expressions as "here" and "there." Their testimony was evidently made clear to the counsel and the trial court; but the mere words of the record convey but little intelligence of the precise localities which they referred to or described, for unfortunately their signs and finger indications are not preserved in the record, and they are left unexplained. We ⁵⁴¹ believe, however, that the facts herein stated as to the course and character of the ditch across the lands in question are fairly to be gathered from the intelligible part of the evidence.

The fall down and along the fourteen hundred feet where the water is first turned loose upon the lands in question is about sixty feet, ranging from three feet and eight inches to six feet and eleven inches to each one hundred feet. Through the second draw or gulch we understand the fall to be greater than that.

Where the water is turned loose as aforesaid no effort was made to confine the water or direct its flow, except as already stated, by the plowing of a few furrows to prevent its spreading. No contrivance was provided or employed to reduce the natural tendency of the water to cut into and wash away the soil. It did, in fact, by constant washing of the soil cut deep channels for itself along said ravines or gulches. The map in the record indicates that through the first fourteen hundred

feet where the water was allowed to run without artificial restraint, the washing was from four to eight feet, and through the second ravine from six to twenty feet; but whether the figures are intended to disclose the width or depth of the washing or cutting is not manifest. The defendant in error, however, testified as follows concerning the cutting along the said fourteen hundred feet draw:

"Well, there was a cut right across that forty (acres) fourteen hundred feet, that was from six to ten feet deep. Q. And how wide? A. Why, it was the most of it from or more than four or five feet wide. Q. And how is it at the bottom of the ditch? A. There is about two hundred feet in the middle of it from twenty-five to thirty feet wide caved in in the center along about the middle of this ditch, washed out. From there up to the northwest line, about probably half the distance, it is about ten feet deep, and narrow so that a man can jump across it in some places."

⁵⁴² Another witness, Mr. Robinson, testified that the wash, in its deepest place, is about thirty feet deep and varies in width from twenty to thirty feet along a distance of about ten rods; but it seems that he was referring to the second place where the water was turned loose upon the lands in question, and that his figures above given did not apply to the fourteen hundred feet place described by the defendant in error.

The excavations or washouts thus caused by the action of the water were not separated from the rest of the field by a fence or other inclosure, nor were any barriers erected to prevent animals from approaching and falling into them. The lands of defendant in error were inclosed and used by him as a winter pasture for some of his livestock; and certain of his horses and cattle were killed by falling into the excavation made as aforesaid in that portion of the conduit referred to as the fourteen hundred feet strip, or the draw where the waters are first discharged upon the lands.

This action was instituted by the defendant in error to recover the damages sustained by him by reason of the injury to his lands resulting from the washing away of the soil, and the loss of said horses and cattle.

The cause was tried to the court without a jury, and the findings were against the right of recovery for the alleged damage to the lands, but sustained the claim made, in part at least, for the loss of the livestock, and judgment was rendered in favor of defendant in error for the sum of one hundred and

thirty dollars. The court found that the plaintiff in error had the right to maintain its ditch over and across the said lands, and that such right had accrued prior to the occupation of and entry of the lands by defendant in error, said lands anterior to such occupation and entry having been public lands of the United States. The ditch company prosecuted error and complains particularly of the third finding, which was as follows:

"The court further finds that the defendant has maintained ⁵⁴³ its said ditch across the lands of the plaintiff, and that at the time of the commencement of this action the water flowing in defendant's ditch had so cut the lands of plaintiff as to render the possession and enjoyment of the plaintiff dangerous to the stock of plaintiff; that defendant negligently left the said ditch unprotected, so that the stock of plaintiff, described in the petition, fell into said ditch and were destroyed, and that said property was of the value of one hundred and thirty dollars, and the defendant is liable, because of its negligence in not protecting said ditch from the encroachment of plaintiff's stock, by fence or other adequate means for the damages so sustained."

There is sufficient evidence to support the finding so far as it relates to the facts. The only question to be determined is the legal one whether, under the circumstances, the plaintiff in error is liable for the damages found to have been sustained by the defendant in error on account of the loss of his livestock.

There can be no doubt that the excavations resulting from the water discharged upon the land and conducted across it were dangerous to cattle and horses within their vicinity. The question with which the court is confronted is whether it was the duty of the owner of the ditch and right of way to guard the dangerous locality, and to provide reasonably adequate means to prevent the approach of the land owner's stock, and thus to obviate the danger of such stock falling into the excavations, or whether that obligation rested upon the owner of the lands across which the waters were conveyed.

In the consideration of that question, the fact, if it be a fact, that the right of way was secured prior to the acquirement of the land by the defendant in error is not, in our opinion, material: *Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681.

The plaintiff in error had acquired a right of way over the lands for certain purposes, and for those purposes, and such as are reasonably connected therewith, only. It might enter upon the lands in a reasonable manner to repair its works, and prob-

ably to attend to such other ⁵⁴⁴ matters as would have a proper relation to the reasonable enjoyment of the right already obtained. But it should be, and we think it was, its duty to so look after and protect its ditch or conduit that it would not interfere with the land owner and the latter's enjoyment of his premises to any greater extent than that reasonably justified by the easement. If the ditch constructed over another's lands is provided with such insufficient embankments as to permit the water to overflow and damage the owner of the lands, there would seem to be no question but that the ditch owner would be liable to respond in damages therefor irrespective of statutory provisions placing such a burden upon him. And where a railroad company has by its embankments, and a failure to provide sufficient culverts as outlets for water, caused rain waters to back up and flood the adjoining premises, resulting in the drowning of animals lawfully there, it has been held liable for the damages sustained; the overflow being, without the intervention of other agencies, the direct and proximate cause of the injury: *Sabine etc. Ry. Co. v. Johnson*, 65 Tex. 389.

Upon the principle that one erecting and maintaining a canal along the line of another's lands is liable for any damage resulting from a want of proper care in the management of the same, or for want of proper care in its construction, a canal company was held liable in damage for the flooding of the houses and barns of a land owner, and the loss thereby of grain, hay, fruit, etc., and injury to household furniture, where the flooding was occasioned by the water from melting snows and rains being impeded in its flow away off the land of complainant on account of the embankments of the ditch of the canal company, the latter having neglected to employ adequate means to prevent such a result: *Arave v. Idaho Canal Co.* (Idaho, Dec. 1896), 46 Pac. 1024.

It is an old and familiar maxim that one must so use his own property as not to injure that of other persons—"Sic utere tuo ut alienum non laedas"—and, in our opinion, ⁵⁴⁵ plaintiff in error is not exempt from its application. The point of danger was located upon its right of way, and is the result of the use thereof. It makes no difference that, as indicated by some of the testimony, the washing was no greater than in other cases of water similarly conducted; nor is it any defense that it may have been impractical to build a flume to conduct the water over the locality in question, or that another and longer course around the hills would have been altogether too expensive and

inconvenient. The right of the company to adopt and employ the natural draw or gulch as a part of its ditch system is not to be questioned, but if a dangerous washout or excavation results therefrom, it seems eminently just and reasonable to require the company to guard and protect it, and to make reasonably adequate provision to prevent animals rightly within the field from falling into it, rather than to throw that burden upon the owner of the field who does not control the right of way and has not created the danger.

It is, no doubt, in recognition of a somewhat kindred idea of justice that the law, which has now become matter of statutory declaration, enjoins upon the ditch owner the duty of carefully maintaining the embankments of the ditch so that the waters may not flood or damage the premises of others, and imposes upon him a liability for all damages accruing to the person or persons owning or claiming the land over which the ditch may be located, in consequence of the construction, keeping up and using the ditch: Rev. Stats. 1899, secs. 897, 901.

In Wood on Nuisances, at section 134, it is said: "When a person is authorized to do an act upon another's premises, the natural effect of which is to endanger the lives and property of those giving the authority, the person so authorized to do the act is bound to provide and maintain all suitable and proper safeguards against injurious results therefrom. The law presumes that the authority given is coupled with that condition." According to the finding of the trial court, the right of way was obtained over the ⁵⁴⁶ lands while they were public, and before the occupation of defendant in error, although the difference in time is shown to have been slight. That fact, however, does not alter the legal situation. The right of way accorded to a ditch owner over the public lands must be held to be acquired with the knowledge and upon the understanding that the land itself remains open for settlement subject only to the right of way previously obtained, and the reasonable enjoyment thereof; and we think it becomes incumbent upon the proprietor of such right of way to furnish and maintain reasonably adequate safeguards or protective appliances against injury to the subsequent settler upon the land. The maxim already adverted to applies to such a case.

In *Joseph v. Ager*, 103 Cal. 517, 41 Pac. 422, it is said: "The dominant owner's encroachments can be justified only to the extent of his easement. As to all beyond that his acts constitute a private nuisance, for which an action may be maintained.

With regard, therefore, to all artificial easements he is bound to keep his works in such a state that they will cause no encumbrance to his neighbor beyond that warranted by the easement; and if he neglects this, he brings himself within the ordinary case of a violation of the rule, 'Sic utere tuo ut alienum non laedas,' and is of course liable to an action."

A case which quite clearly approaches the one at bar in principle is *Williams v. Groucott*, 4 Best & S. 148 (116 Eng. C. L.), where it was held that a person entitled to the minerals under the land of another, with license to make a mine shaft opening into it, is, in the absence of a stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing: See, also, *Sybray v. White*, 1 Mees. & W. 435.

It seems that two of the animals fell into the ditch during a snowstorm, and the inference is drawn, and probably ⁵⁴⁷ correctly so, that the storm caused them to travel toward and into the dangerous excavation. Hence it is contended that the want of care on the part of the ditch owner was not the natural and proximate cause of the injury.

A defendant is not liable, as a general rule, for anything beyond the natural, ordinary, and reasonable consequences of his conduct: 1 *Sutherland on Damages*, 57. We do not deem it necessary to extend the discussion of this question further than to say that it is clear that the result might reasonably have been foreseen as probable. Storms are liable to occur. They are natural and not extraordinary. It is just such exigencies that require barriers to be erected to keep cattle from getting into a dangerous place. The washout and the failure to provide the proper safeguards is to be considered, in our opinion, as the cause of the loss of the cattle, and the damage was not so remote as to exonerate the plaintiffs in error from liability.

The judgment was entered as follows: "Wherefore it is by the court considered and adjudged that the plaintiffs have and recover judgment against the said defendant in the sum of one hundred and thirty dollars, his damages so as aforesaid sustained and the costs of this action taxed at \$——." It is contended by counsel for plaintiff in error that the judgment is void as to the costs, for the reason that a blank appears where the amount of the costs should have been inserted.

The costs are under our practice taxed by the clerk. Under the statute as existing prior to 1890 a specific fee was fixed to be collected by the clerk for that service. They may not be and are not, generally at least, ascertained at the time judgment is rendered, or even when it is entered upon the journal. Generally, the costs follow the judgment as an incident thereof; and it would be sufficient in a judgment to say, "And his costs in this behalf laid out and expended," or words of similar import, without stating or attempting to state the amount. The judgment is for the "costs of this action." The amount ⁵⁴⁸ thereof may be taxed by the clerk after the judgment is entered and then inserted, in case a blank has been left for that purpose. We think the more reasonable rule is, under a practice such as our own, that the judgment for costs in this case is not void: *Wilkins v. Huse*, 9 Ohio, 154; *Frankel v. Chicago etc. Ry. Co.*, 70 Iowa, 424, 30 N. W. 679; *Linton v. Housh*, 4 Kan. 535; *Clippenger v. Ingram*, 17 Kan. 584; *Calhoun v. Terry etc. Co.*, 21 Conn. 525; *Leyde v. Martin*, 16 Minn. 38; *Beedle v. Mead*, 81 Mo. 297; *Palmer v. Glover*, 73 Ind. 529.

In *Clippenger v. Ingram*, 17 Kan. 584, the judgment entry was similar to that in the case at bar. The court said: "It will be seen that the costs of this case have not yet been taxed, and the judgment with reference to the amount thereof is left blank. It would seem that the plaintiff in error has fears that the costs may be taxed erroneously. We presume, however, that they will be taxed correctly. The judgment will certainly authorize a correct taxation of the costs. If, however, the clerk should tax them erroneously, the court would undoubtedly correct the taxation on motion." The judgment was affirmed notwithstanding the character of the judgment entry.

In *Frankel v. Chicago etc. Ry. Co.*, 70 Iowa, 424, 30 N. W. 679, the supreme court of Iowa said: "Defendants' counsel insist that there was no judgment for costs in the circuit court. In each case the record shows an entry in the words, 'Judgment for costs, taxed at \$——.' This is the uniform practice of entering judgments. Probably it is usual for the amount of the costs to be entered after the term, when the clerk finds time to tax them. But the judgment is for the costs, which the clerk is authorized to tax at any time he may fill the blank. The costs are often retaxed, when the amount, even should the blank have been filled, could be changed."

Counsel for the plaintiff in error relies upon the case of *Mosh-er v. Board of County Commrs.*, 2 Wyo. 463. That case, how-

ever, is easily distinguished from the one now before us; there the only judgment rendered was as ⁵⁴⁹ follows: "The court therefore finds for the defendants, and that the defendants recover their costs taxed at \$—— from and of the plaintiff." It is doubtful if that amounted to a judgment at all even had the blank been filled. It would seem to have been a finding only. But the court held that as the judgment was only for costs, it was no judgment because it was not exact in amount. It will be observed that the judgment did not pretend to afford any relief whatever except the recovery of costs. The ordinary language used in such a judgment, to the effect that the defendant go hence without day, or that the action be dismissed, was absent.

We perceive no error in the record, and the judgment will be affirmed.

Corn and Knight, JJ., concur.

IRRIGATION DITCH.—CANAL COMPANIES are required to use reasonable skill, judgment, and care in the construction of their ditches for irrigation purposes, and in their maintenance and repair: *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 72 Am. St. Rep. 784, 54 Pac. 1009. See, also, *King v. Miles City etc. Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 421.

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ACKNOWLEDGMENT.

1. **ACKNOWLEDGMENTS—IMPEACHMENT.**—The certificate of an officer having authority to take acknowledgments cannot be impeached by showing that his duty was irregularly performed. Such certificate is, in the absence of fraud, conclusive in favor of those who in good faith rely upon it. (Council Bluffs Sav. Bank v. Smith, 669.)

2. **ACKNOWLEDGMENTS—CONCLUSIVENESS OF—MARRIED WOMEN.**—If a married woman appears before a notary public for the purpose of acknowledging a deed or mortgage, and does in some manner attempt to do what the law requires to be done, the officer's certificate is, in the absence of fraud, conclusive of the facts therein stated as regards innocent purchasers. (Council Bluffs Sav. Bank v. Smith, 669.)

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ACTION.

1. **ACTIONS—ABATEMENT.**—One action to be available as plea in abatement to another, must involve the same cause of action, and the fact that it depends upon the same right or title is not sufficient. (Watson v. Richardson, 331.)

2. **ACTIONS—TORT—BREACH OF CONTRACT.**—An action is not one for breach of contract, but sounds in tort, where the complaint sets forth a conspiracy to commit a wrong, and acts pursuant thereto, to the special injury of the plaintiff. (Galzow v. Buening, 17.)

ACT OF GOD.

See Negligence, 2; Warehouseman, 1.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—TITLE.—ACTUAL OCCUPANCY** of land, to the exclusion of the true owner, for the statutory period, is all that is necessary to preclude such owner from thereafter reclaiming the property. It only requires an actual, hostile, exclusive occupancy of land, without any presumption or claim of right, to satisfy the limitation statute as to adverse possession. (Illinois Steel Co. v. Budzisz, 54.)

2. ADVERSE POSSESSION—APPLICATION OF STATUTES.—

An actual, hostile, exclusive occupancy of land does not, before the expiration of the period prescribed by the statute of limitations, constitute any estate or interest in the land, nor is the substitution of another occupant, to continue the dispossession of the true owner, the transfer of any such estate or interest within the meaning of a statute concerning the creation and transfer of an estate or interest in land. Such a statute is entirely independent of the statute of limitations. (*Illinois Steel Co. v. Budzisz*, 54.)

3. ADVERSE POSSESSION—TACKING POSSESSIONS—PRIV-

ITY.—While the possession of several distinct occupants of land, lasting for a continuous period of twenty years, cannot be united to satisfy the statute of limitations, successive possessions, each reaching to and uniting with the one that follows it, by privity between the occupants, so as to render the possession of the property continuous from the first entry to the end of the period of twenty years, satisfies the statute. (*Illinois Steel Co. v. Budzisz*, 54.)

4. ADVERSE POSSESSION—TACKING POSSESSIONS—

PRIVITY—SUFFICIENCY OF TRANSFER.—A paper transfer is not necessary to connect adverse possessions of successive occupants of land together for the purpose of the statute of limitations. It is sufficient if one occupant receives his possession from another by the act of the latter or by operation of law. Hence, a parol transfer of possession by one to another, as the former goes out of, and the latter goes into, possession, satisfies the essential of privity to tack the possessions together. (*Illinois Steel Co. v. Budzisz*, 54.)

5. ADVERSE POSSESSION OF FATHER FOR SON.—Adverse

possession of land by a father and his minor son for a period of more than seven years, under a deed which purports to convey title to the son, invests the son with title. (*Woodruff v. Roysden*, 905.)

6. ADVERSE POSSESSION BY ONE TENANT IN COMMON,

WHEN BENEFITS ALL.—Where several tenants in common claim under deeds purporting to convey to them the fee in the land, adverse possession by one, who does not claim to hold exclusively for himself, for a period of more than seven years, inures to the benefit of his cotenants, and will exclude all adversary constructive possession in another having the legal title to the land. (*Woodruff v. Roysden*, 905.)

7. ADVERSE POSSESSION.—SUCCESSIVE ADVERSE POS-

SESSIONS OF TWO DIFFERENT TENANTS IN COMMON may be joined together and inure to the benefit of a tenant in common not in possession, where the cotenants claim under color of title and not as naked trespassers. (*Woodruff v. Roysden*, 905.)

8. ADVERSE POSSESSION—INTERRUPTING.—SUIT

BROUGHT AGAINST A GRANTOR who does not claim to own the land, and is not in possession, does not interrupt the continuity of adverse possession of the grantee who is the true owner and in possession of the property. (*Woodruff v. Roysden*, 905.)

9. ADVERSE POSSESSION AS BETWEEN GRANTOR AND

GRANTEE.—Refusal by a grantor by warranty deed in possession of the premises to surrender them to the grantee is notice to the latter to proceed to the vindication of his rights, and if he delays doing so beyond the period of twenty-one years, his deed cannot prevail against his grantor's adverse possession. The grantor need only defy his grantee's right to possession by distinctly refusing it when demanded, and if he is not disturbed for the period of statutory limitation, he is protected in his title, if he can establish the

kind of adverse possession required by the law in the interval. (Milnes v. Van Gilder, 828.)

10. ADVERSE POSSESSION BY GRANTOR AS AGAINST GRANTEE.—A grantor with warranty may originate a possession adverse to his grantee, and such possession differs from that originated by a stranger only in requiring stronger proof to sustain it. (Milnes v. Van Gilder, 828.)

See Pleading, 10.

AGENCY.

1. AGENT'S PURCHASE OF HIS PRINCIPAL'S PROPERTY AT A FORECLOSURE SALE—EFFECT OF.—An agent employed to sell real estate for his principal cannot, without renouncing his agency, rightfully bid in the property for himself at a mortgage foreclosure sale thereof, even where he has given notice to his principal of his intention to purchase for himself. Such a purchase will inure to the benefit of the principal, and the agent must, in equity, account to him therefor. (Kimball v. Ranney, 548.)

2. AGENT'S PURCHASE OF HIS PRINCIPAL'S PROPERTY AT A FORECLOSURE SALE—RATIFICATION—ESTOPPEL—LACHES—ACCOUNTING—INTEREST.—If an agent employed to sell his principal's property bids it in for himself at a mortgage foreclosure sale thereof, the principal does not ratify the purchase, or estop himself from claiming that it inures to his own benefit, by obtaining an order for a resale of the property and afterward, being unable to comply with the conditions of the order, or to effect a settlement with the agent, accepts surplus moneys arising from the sale, and then waits several years before he files a bill against the agent for an accounting; and the defense of laches cannot prevail where the agent has, at all times after his purchase, denied the complainant's rights in the property; but the agent, in accounting for the proceeds of the transaction, is entitled to interest upon his disbursements. (Kimball v. Ranney, 548.)

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ANIMALS.

1. ANIMALS—SHEEP-KILLING DOGS—LIABILITY FOR.—If dogs of different owners unite in killing or worrying sheep, each owner is answerable for the whole amount of damage done, where the statute makes the owner or keeper of a dog doing injury to sheep liable "for all damages so done." (Nelson v. Nugent, 51.)

2. ANIMALS—KILLING OF SHEEP BY DOGS—EVIDENCE.—If thirteen of the plaintiff's sheep have been killed, and others in-

jured, by two dogs, and the tracks of one are traced to the defendant's house, the incriminating appearance of the dog, with the accompanying circumstances, is sufficient evidence to justify a verdict that the defendant's dog was concerned or engaged in the killing. (*Nelson v. Nugent*, 51.)

3. **ANIMALS—SHEEP-KILLING DOGS—KILLING OF—WHEN JUSTIFIABLE.**—A sheep-killing dog is not much favored in law. Hence, if it has been caught chasing lambs, and is found a few days afterward on the owner's premises in company with another dog, and unaccompanied by any person, such owner is justified in having the former dog immediately killed without waiting for it to chase the sheep again. (*Throne v. Mead*, 568.)

See Game.

ANNULMENT OF MARRIAGE.

See Marriage and Divorce, 3-5.

APPEAL.

1. **APPEAL—LIMITATION OF TIME—JURISDICTION.**—Statutes limiting the time of appeal are jurisdictional and mandatory, and in the absence of express authorization therein, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. (*Williams v. Long*, 68.)

2. **APPEAL—LIMITATION OF TIME—DEATH OF RESPONDENT.**—No appeal can be taken from a judgment after the statutory period has elapsed, notwithstanding the fact that the respondent died eighteen days before such period had expired, and only after the expiration of six months was an administratrix of his estate appointed, upon whom service with due diligence could be made. (*Williams v. Long*, 68.)

3. **APPEAL—ASSIGNMENTS OF ERROR—WAIVER OF.**—An assignment of error not mentioned in the appellant's brief will be treated as waived. (*Ferguson v. Wilson*, 543.)

4. **APPELLATE PRACTICE.—EXCEPTIONS** do not lie to rulings that fail to raise questions of law. (*Hatch v. First Nat. Bank*, 401.)

5. **APPEAL—RECORD—BILL OF EXCEPTIONS.—RULINGS ON DEMURRERS**, and upon motions to set aside or in arrest of a judgment, should appear on the face of the record and should not be taken to an appellate court by bill of exceptions. (*Expressman's Mut. Ben. Assn. v. Hurlock*, 470.)

6. **JUDGMENTS, IF CORRECT**, will not be reversed because wrong reasons are given therefor by the trial court. (*Derry Council v. State Council etc.*, 838.)

7. **INSTRUCTIONS—REVIEW ON APPEAL.—AN OMISSION** to instruct the jury as to the burden of proof cannot be noticed on appeal, when no request was made at the trial to supply such omission. (*Bergman v. Hendrickson*, 47.)

8. **APPEAL—CRIMINAL LAW—MISCONDUCT OF ATTORNEY AND JUDGE.**—Where a claim of misconduct on the part of the prosecuting attorney and the judge is supported and denied by affidavits which squarely contradict each other, the duty of ascertaining the truth from such affidavits is peculiarly the province of the trial judge, and such discretion will not be interfered with on appeal unless it has been abused. (*People v. Rushing*, 141.)

9. APPEAL—MISTAKE IN RECORD—CORRECTION.—Where the name of a person is erroneously stated in the record, and counsel on both sides admit the error, an appellate court will not rest its decision upon such false statement, which could be readily cured by the admission of the respondent's attorney, or by amendment in the court below, or upon order to such court by the appellate court. (Grand Grove etc. v. Garibaldi Grove, 80.)

10. APPELLATE PRACTICE—DIRECTING VERDICT.—If a verdict is rendered in obedience to a peremptory instruction from the trial court, it is the duty of the appellate court, in reviewing the questions presented for decision, to assume every material fact which the evidence for the complaining party establishes or tends to prove. (Paxton v. State, 689.)

APPROPRIATION.

See Constitutional Law, 24.

ARREST.

1. ARREST IN CIVIL ACTION—JURISDICTION.—A COURT cannot confer jurisdiction by assuming it, nor can its determination that it has jurisdiction confer it. Hence, where it has in fact no jurisdiction to act, an order of arrest issued by it is void. (Fukumoto v. Marsh, 73.)

2. ARREST IN CIVIL ACTION—JURISDICTION—SUFFICIENCY OF AFFIDAVIT.—Whether a court has jurisdiction to order the arrest of a debtor must be determined from the affidavit for the arrest, and not from what the judge thinks it authorizes him to do. Hence an affidavit resting wholly or in any one essential particular on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order. (Fukumoto v. Marsh, 73.)

3. FUGITIVES FROM JUSTICE—NECESSITY OF WARRANT.—The arrest and confinement in jail and delivery over to the proper authority of a person guilty of a felony anywhere in the United States, if found in this state, is authorized only when a warrant has been issued by judicial authority upon affidavit of the facts. He cannot be committed to jail by any judicial officer before whom he may be brought until satisfied, upon hearing evidence, of his guilt. (Glazar v. Hubbard, 340.)

See False Imprisonment.

ASSAULT.

ASSAULT—WHAT CONDUCT DOES NOT AMOUNT TO.—If a man dresses himself in a woman's clothes, and goes at dusk to a neighbor's house, just "to have a little fun," and follows the latter's wife into her house, but makes no demonstration other than to tap the end of a parasol on the ground or floor, there is no assault, where such person does not offer or threaten to do the woman any physical injury, and it does not appear that he acts from malicious motives or with any intent to injure her. (Nelson v. Crawford, 577.)

See Homicide, 2; Master and Servant, 10.

ASSESSMENT.

See Street Assessment; Taxation.

ASSIGNMENT.

1. ASSIGNMENTS — RENT — RIGHTS OF ASSIGNEE.—Rent due and accrued for a certain year out of a term of years may be assigned without an assignment of the lease, and the assignee need not allege an assignment of the lease in an action to recover the rent assigned. (*Ramsey v. Johnson*, 948.)

2. ASSIGNMENTS—RENT—LIEN—RIGHTS OF ASSIGNEE.—An assignment of the lease is not essential to enable the assignee of rent due and accrued to enforce a lien upon leased personal property, provided by the lease as security for the rent. (*Ramsey v. Johnson*, 948.)

3. ASSIGNMENTS — RIGHTS AND REMEDIES OF ASSIGNEE.—An assignment of a debt carries with it every remedy and security available to the assignor as incident thereto, although they are not specifically named in the instrument of assignment. (*Ramsey v. Johnson*, 948.)

ASSOCIATION.

1. BENEVOLENT ASSOCIATIONS — FINDINGS OF TRIBUNALS OF—CONCLUSIVENESS.—In the absence of anything in the constitution or by-laws of a benevolent association making findings of the tribunals of such society that a member is not entitled to sick benefits conclusive, they are not conclusive, notwithstanding a custom to the contrary, so as to preclude a resort to a court of law for relief. (*Wuerthner v. Workingmen's Ben. Soc.*, 484.)

2. BENEVOLENT ASSOCIATIONS — EXPULSION OF CLAIMANT OF BENEFITS AS AFFECTING RIGHT TO SUE.—A benefit society cannot affect a member's right to sick benefits, or to sue therefor, by expelling him, upon the theory that his claim is fraudulent. (*Wuerthner v. Workingmen's Ben. Soc.*, 484.)

3. BENEVOLENT ASSOCIATIONS—OBLIGATION TO PAY SICK BENEFITS—CAUSE OF ILLNESS.—In the absence of anything in the constitution or by-laws of a benefit society releasing it from obligation to pay sick benefits if caused by the indiscretion of the member, it is liable therefor, although his condition is caused by his indulgence in unnatural vice. (*Wuerthner v. Workingmen's Ben. Soc.*, 484.)

4. CORPORATIONS — BENEFICIAL ASSOCIATIONS — CORPORATE ACTS OUTSIDE OF STATE.—A beneficial association incorporated in one state for the promotion of the interests of its members, and to afford them relief in sickness, and having subordinate councils and members throughout the United States, may, at a meeting held outside the state of its incorporation, impose a valid per capita tax on all of its members. Such association is not within the rule that a corporation must perform all of its corporate acts within the state that gives it life. (*Derry Council v. State Council etc.*, 838.)

5. BENEFICIAL ASSOCIATIONS—OBJECTION TO PER CAPITA TAX.—If the by-laws of a beneficial association direct that the per capita tax on members shall be an amount to be "enacted" yearly, an objection that such tax was not enacted by a statute of the association is of no avail in an action to collect such tax, if the financial committee of the association has recommended the amount of the tax, and the national council has approved such recommendation. (*Derry Council v. State Council etc.*, 838.)

6. BENEFIT SOCIETIES—SUIT AGAINST DISSOLVED SUBORDINATE SOCIETY—PARTIES.—In a suit by an incorporated grand grove of United Ancient Order of Druids against a subordinate grove which has been dissolved, the defunct grove is not a proper party defendant, the individual members named being the only real defendants. (Grand Grove etc. v. Garibaldi Grove, 80.)

7. BENEFIT SOCIETIES — VOLUNTARY — NATURE.—Voluntary unincorporated societies are not bodies politic or corporations, but are mere aggregates of individuals called for convenience by a common name. (Grand Grove etc. v. Garibaldi Grove, 80.)

8. BENEFIT SOCIETIES — POWER TO HOLD PROPERTY.—Voluntary unincorporated associations cannot acquire or hold property. The property it is said to acquire is in fact the property of its members, and each member's share is his own private property. (Grand Grove etc. v. Garibaldi Grove, 80.)

9. ASSOCIATIONS—VOLUNTARY—SUITS AGAINST.—Voluntary unincorporated associations can neither sue nor be sued, and in suits where they are apparently parties, the real parties are the members of the association. (Grand Grove etc. v. Garibaldi Grove, 80.)

10. ASSOCIATIONS — VOLUNTARY—EXPULSION OF MEMBERS.—Voluntary unincorporated associations are not vested with the right of expulsion of members by the general law of the land, but by the agreement of the members as expressed in the charter, constitution, and by-laws of the association. No member can be expelled, and thus deprived of his share of the property of the association, unless for the violation of some provision of the law of the association creating the offense charged, and prescribing expulsion as the penalty. (Grand Grove etc. v. Garibaldi Grove, 80.)

11. ASSOCIATIONS — VOLUNTARY — EXPULSION—NOTICE OF HEARING.—No member can be expelled from a voluntary association without due notice of the charge against him, and of the trial of the charge, and an opportunity of being heard in his defense; if no other method of notice is prescribed by the by-laws, it must be served personally. (Grand Grove etc. v. Garibaldi Grove, 80.)

12. ASSOCIATION — VOLUNTARY — EXPELLING SUBORDINATE ASSOCIATION—NOTICE OF HEARING.—The rules applicable to the expulsion of a member of a voluntary association are applicable to the expulsion of a subordinate society and its members. Hence notice of the hearing of a charge against a subordinate society must be served personally on the members, unless the constitution or by-laws of the association provide that such notice may be served on the officers of the subordinate society. (Grand Grove etc. v. Garibaldi Grove, 80.)

13. ASSOCIATIONS—EXPULSION OF SOCIETY—CITATION TO FORMER OFFICERS—JURISDICTION—DE FACTO OFFICERS.—Service of a notice of the hearing of a charge against a subordinate grove of Druids upon former officers, whose term expired eight months before, and who had abdicated their offices prior to such expiration, cannot confer jurisdiction upon the grand grove to forfeit the charter of the subordinate grove, where there were de facto officers, who had been elected the successors of those whose terms had expired, to whom no notice was given, especially where the laws of the association do not provide for vicarious service on the officers of a subordinate grove. Such a proceeding deprives the members of the subordinate grove of their property without due process of law. (Grand Grove etc. v. Garibaldi Grove, 80.)

14. ASSOCIATIONS—FORFEITURE OF CHARTER—JURISDICTION—FINDING.—Jurisdiction of the grand grove of Druids to forfeit the charter of a subordinate grove does not appear from a finding that a person appeared before the trial committee on the part of the defendants, who comprise only two members of the subordinate grove, under authority given him by only one of such members, whose authority does not appear. (*Grand Grove etc. v. Garibaldi Grove*, 80.)

15. ASSOCIATIONS—FORFEITURE OF CHARTER OF SUBORDINATE SOCIETY—JURISDICTION.—Written charges against a subordinate grove of Druids, alleging general violation of the terms of its charter and that it had refused to obey the laws of the grand grove, and stating specific acts which do not appear to be violations of the charter or of any laws of the order, do not state an offense justifying forfeiture of the charter of the subordinate grove, and confer no jurisdiction on the grand grove over the subject matter of the proceeding. (*Grand Grove etc. v. Garibaldi Grove*, 80.)

See *Building and Loan Association; Insurance*, 7, 8.

ATTORNEY AND CLIENT.

ATTORNEYS AT LAW—FEES—LIEN FOR.—An attorney at law who has rendered valuable services to his client is not entitled to have a lien declared for compensation for such services, where there is no fund under the control of the court upon which it could fix a lien, and no adverse parties against whom a decree in his favor could be rendered. (*New Memphis Gaslight Company Cases*, 880.)

See *Appeal*, 9; *Partition*, 2.

BAILMENT.

1. BAILMENT—NEGLIGENCE—ACTION FOR DAMAGES—EVIDENCE.—IT IS PREJUDICIAL ERROR, in an action to recover damages for an injury to a horse, hired by the plaintiff to the defendant, and which the plaintiff claims was foundered while in the defendant's possession, to permit the defendant, against objection, to establish his defense by hearsay testimony. (*Hildebrand v. Carroll*, 29.)

2. BAILMENT—ACTION FOR DAMAGES—BURDEN OF PROOF.—When a bailment is such that the property is in the exclusive possession of the bailee, away from the bailor, and the property is returned in a damaged condition, and it is shown that the injury is such as does not ordinarily occur without negligence, proof of these facts establishes a prima facie case against the bailee, throwing upon him the burden of showing that the injury did not occur through his negligence. (*Hildebrand v. Carroll*, 29.)

BANKS AND BANKING.

1. BANKS.—A CREDIT ENTRY IN A DEPOSITOR'S PASS-BOOK CANNOT BE CANCELED by a bank after it has acknowledged its relation of debtor to him. Hence, if it receives from him for collection a draft indorsed by another, forwards it to its subagent, which receives the drawee's check for the amount, and upon being notified of that fact by the subagent gives the depositor credit in his pass-book for the amount, it cannot afterward, upon nonpayment of the check, cancel the credit given to the depositor, for it must be deemed to have intended to treat the draft as paid. The

entry in the pass-book closes the transaction of collection and charges the bank as a debtor to its client for the amount of the draft. (*Kirkham v. Bank of America*, 714.)

2. **CERTIFICATES OF DEPOSIT—RIGHTS OF HOLDER.**—The owner of a certificate of deposit or other evidence of money in the custody of a solvent bank is as effectually invested with the control and dominion of such money as though there had been a manual delivery thereof to him. (*Paxton v. State*, 689.)

3. **STATUTE OF LIMITATIONS.—AN ACTION BROUGHT AGAINST A BANK TO RECOVER DAMAGES FOR A REFUSAL TO HONOR** the check of the plaintiff, who has money on deposit subject to call, is not an action of slander which is barred by a six months' statute of limitations, since such statute applies only to actions for injurious words and not to actions for injurious acts. (*The J. M. James Co. v. Bank*, 857.)

4. **BANKS—DISHONORING CHECKS—DAMAGES.**—In an action against a bank to recover for a refusal to honor the check of the plaintiff who has money on deposit subject to call, an averment that the plaintiff is a trader is sufficient to entitle him to recover substantial damages, though special damage is not alleged. (*The J. M. James Co. v. Bank*, 857.)

5. **BANKS—DISHONORING CHECKS—PLEADING.**—In a suit against a bank to recover for a refusal to honor the plaintiff's check, the complaint need not aver that the bank had no lien on the money deposited; if such lien exists it is a matter of defense which must be pleaded. (*The J. M. James Co. v. Bank*, 857.)

6. **BANKS—DISHONORING CHECKS—SPECIAL DAMAGE.**—In a suit against a bank to recover for a refusal to honor the plaintiff's checks, the plaintiff cannot show that particular persons have ceased to deal with him, unless the loss of their custom is set out in the pleadings as special damage, but testimony showing the general impairment of the plaintiff's credit by the dishonor of these checks, may be received. (*The J. M. James Co. v. Bank*, 857.)

7. **BANKS—DISHONORING CHECKS—DAMAGES—PRESUMPTION.**—In an action against a bank to recover for a refusal to honor plaintiff's checks, where the plaintiff avers and proves that he was a trader, and that his checks were dishonored wrongfully by the bank, the law conclusively presumes that he has sustained damages which the jury, under proper instructions, must fix. (*The J. M. James Co. v. Bank*, 857.)

8. **BANKS—DISHONORING CHECKS—DAMAGES FOR LOSS OF CREDIT.**—A depositor whose checks have been dishonored wrongfully by a bank may recover not only for the damage to his credit with the persons to whom the checks were given, but for the injury to his business standing as far as the knowledge of the dishonor of the checks extends. (*The J. M. James Co. v. Bank*, 857.)

9. **BANKS—DISHONORING CHECKS—MISLEADING INSTRUCTION.**—In an action against a bank to recover for a refusal to honor the checks of the plaintiff who had ample funds on deposit, an instruction regarding the distinction between an absolute refusal to pay the checks and a request for delay to look into the condition of the plaintiff's account, is misleading and prejudicial to the plaintiff, where there is no evidence to justify such instruction. (*The J. M. James Co. v. Bank*, 857.)

BASEBALL GAME.

See Sunday.

BENEFIT SOCIETY.

See Association; Insurance, 7.

BILL OF EXCEPTIONS.

See Appeal, 6.

BOARD OF HEALTH.

1. **BOARDS OF HEALTH — CONSTITUTIONAL LAW.**—A statute establishing a state board of health, in order to secure and promote the public health, and investing it with power to adopt ordinances, rules, and regulations necessary to secure such objects, is not unconstitutional as being a delegation of legislative power, since such inhibition does not extend to prevent the grant to an administrative board of the power to adopt rules or ordinances to carry out a particular purpose. (*Blue v. Beach*, 195.)

2. **BOARDS OF HEALTH.—THE RULES AND BY-LAWS** adopted by boards of health have the force and effect of a law of the legislature; but such rules must be reasonable, not in conflict with the state's organic law, or antagonistic to the general law, or opposed to the fundamental principles of justice, or inconsistent with the powers conferred upon such boards. (*Blue v. Beach*, 195.)

3. **VACCINATION OF SCHOOL CHILDREN.**—Under a statute conferring power to protect the public health and to prevent the spread of contagious and infectious diseases, a local board of health may, in times of danger of a smallpox epidemic, require that no unvaccinated child be allowed to attend the public schools during the continuance of such danger; or the board may, in its discretion, direct that the schools be temporarily closed during such emergency, regardless of whether or not the pupils thereof refused to be vaccinated. (*Blue v. Beach*, 195.)

BONDS.

See Surety.

BRIDGE.

See Waters and Watercourses, 2-4.

BUILDING AND LOAN ASSOCIATION.

1. **BUILDING AND LOAN ASSOCIATIONS — INSOLVENCY—DIVISION OF ASSETS.**—The assets of a building and loan association are the common property of all the stockholders, and the claims upon it are the demands of all the stockholders for a distribution, and where the profits of the association would have been divided in proportion to the investment of the stockholders, the losses, upon insolvency, should be borne by the same persons and in the same proportions. (*MacMurray v. Sidwell*, 255.)

2. **BUILDING AND LOAN ASSOCIATION—FOREIGN—INSOLVENCY—PREFERENCE OF STOCKHOLDERS.**—Where a foreign building and loan association while doing business in a state fully complies with its laws, and upon a change of the law ceases to do business other than to collect dues on stock, and interest and premiums on loans, already in existence, if the association thereafter becomes insolvent, the stockholders in such state have no preferential claim upon the assets found there, since all the stockholders have a common interest in the funds of the association wherever located. (*MacMurray v. Sidwell*, 255.)

CERTIFICATE OF DEPOSIT.

See Banks and Banking, 2; Negotiable Instrument, 2-3.

CHARITIES.

See Perpetuities.

CHATTEL MORTGAGE.

1. CHATTEL MORTGAGES—HORSE—CHANGE IN COLOR.—

A mortgagee of a horse, who has done all the law required him to do, by specifically describing the animal in the mortgage and duly recording that instrument, does not lose his lien because of a subsequent change in the color of the horse, even though it has been sold to a party in another county who has no actual notice of the mortgage. (*Turpin v. Cunningham*, 808.)

2. CHATTEL MORTGAGES—NOT VALID, WHEN UPON AFTER-ACQUIRED PROPERTY.—One may mortgage after-acquired property, but this rule does not apply to goods and chattels subsequently acquired, which have no connection with property actually in existence at the time of the mortgage. Hence, if a mortgage is given upon specified chattels to secure annual payments of money for a number of years, a clause therein inserted by the mortgagor that it shall also cover "all other personal property" which he "may own or acquire during said years" does not, as against bona fide purchasers or attaching creditors, create a valid lien upon property acquired subsequently, outside of the business in which he was then engaged, and having no connection therewith. (*Ferguson v. Wilson*, 543.)

3. CHATTEL MORTGAGES—RECORDING—PROTECTION OF CREDITORS.—Under a statute requiring chattel mortgages to be recorded, and providing that otherwise they shall be void "as against creditors of the mortgagor," the latter term embraces all creditors, antecedent as well as subsequent. (*First Nat. Bank v. Ludvigsen*, 928.)

4. CHATTEL MORTGAGES—RECORDING—RENEWAL.—Under a statute providing that unrecorded chattel mortgages shall be void "as against creditors of the mortgagor," an unrecorded chattel mortgage not renewed as required by law ceases to be valid as against creditors of the mortgagor who became such before as well as after the default in renewal. (*First Nat. Bank v. Ludvigsen*, 928.)

See Conflict of Laws, 4; Executor and Administrator, 7-9.

CHECK.

See Banks and Banking, 4-9.

CLOUD ON TITLE.

1. CLOUD ON TITLE—BILL TO REMOVE—WHO MAY MAINTAIN.—The owner of land in possession thereof, who has conveyed it by quitclaim deed, may maintain a bill to remove a cloud from the title, upon proof that such deed was intended as a mortgage. (*Beck Lumber Co. v. Rupp*, 190.)

2. CLOUD ON TITLE—LACHES IN SEEKING TO REMOVE.—The owner in possession of property after conveying it by quitclaim deed intended merely as a mortgage is not chargeable with laches in attempting to remove a cloud from his title if no attempt has

been made to enforce any right under the deed constituting such cloud. (*Beck Lumber Co. v. Rupp*, 190.)

3. **COSTS OF BILL TO REMOVE CLOUD ON TITLE.**—Costs of a proceeding to remove a cloud from a title resulting in a judgment for plaintiff are properly decreed against the defendant, if he refuses to release the lien of his judgment constituting such cloud, upon demand made before commencement of the proceeding to remove such cloud. (*Beck Lumber Co. v. Rupp*, 190.)

COLLATERAL SECURITY.

See Pledge.

COMBINATIONS.

See Monopoly.

COMITY.

See Conflict of Laws, 24.

CONFLICT OF LAWS.

1. **CONTRACTS—REMEDIES — CONFLICT OF LAWS.**—Remedies on contracts are to be regulated and controlled by the law of the place where the action is brought, and not by the law of the place of the contract. (*Lamberton v. Grant*, 415.)

2. **COMITY BETWEEN STATES—LIMITATION UPON.**—Judicial comity does not require the courts of one state to enforce any clause of an instrument executed by a corporation of another state to secure its creditors, which, even if valid under the *lex domicilii*, conflicts with the policy of the former state relating to property within its borders, or impairs the rights or remedies of domestic creditors. (*Dearing v. McKinnon etc. Hardware Co.*, 708.)

3. **TRANSFER IN OTHER STATES, WHEN NOT VALID AS TO CREDITORS HERE.**—A transfer of property in another state, although valid there, which would be void as to creditors if made here, does not confer title to personal property situated here that is good as against a resident of this state armed with legal process to collect a debt. To this extent, in nearly all jurisdictions, the rule of comity yields to the policy of the state with reference to the collection of debts due to its own citizens, out of property within its boundaries and protected by its laws. (*Dearing v. McKinnon etc. Hardware Co.*, 708.)

4. **COMITY BETWEEN STATES—TRUST MORTGAGE EXECUTED BY FOREIGN CORPORATION TO SECURE ITS CREDITORS.**—If a foreign corporation, becoming insolvent, executes a trust mortgage upon chattels, which permits it to keep possession of all its property, to continue its business, to buy, manufacture, and sell "in the usual course of trade," and has coercive provisions, requiring all creditors, before they can take any benefit therefrom, to come in under it and accept its terms, and, if their debts become due before the mortgage, to so extend the time of payment that they cannot be enforced until after the mortgage matures, such instrument, even if valid under the *lex domicilii*, is void upon its face as to chattels within this state, on account of such coercive provisions, and is ineffectual to withdraw the property from attachment by domestic creditors of the foreign corporation; and, without considering the coercive provisions, there is presented a question of

Fact as to actual and intentional fraud on the part of the mortgagor. (Dearing v. McKinnon etc. Hardware Co., 708.)

See Executor and Administrator, 11; Limitation of Actions, 2-7; Mechanic's Lien, 9.

CONSPIRACY.

1. CONSPIRACY TO DEFRAUD—SEANCES.—Persons combining to deceive the public by conducting materializing seances are guilty of a conspiracy to defraud any individual who pays money to witness the seances, although he is not actually deceived. (People v. Gilman, 490.)

2. CONSPIRACY TO DEFRAUD BY FALSE PRETENSES may exist, although the means employed are not calculated to deceive persons of ordinary intelligence. (People v. Gilman, 490.)

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—DISCRIMINATION AGAINST ALIENS.—A state statute which forbids peddling except under a license, and which provides that citizens may be thus licensed, and that aliens shall not be, is a denial of the "equal protection of the laws" as to the latter and an unconstitutional discrimination against them not sustainable as a proper exercise of the police power of the state. (State v. Montgomery, 386.)

2. CONSTITUTIONAL LAW—REGISTRATION OF AND LICENSING GUIDES.—A statute requiring a person acting as guide in inland fisheries and forest hunting to be registered and certified by the commissioners of inland fisheries and game, and to pay a reasonable fee therefor, and imposing a penalty for engaging in such vocation without first complying with the statute, is constitutional and valid, and does not deprive him from engaging in a lawful vocation. (State v. Snowman, 380.)

3. CONSTITUTIONAL LAW—LICENSE FEE FOR DOGS.—A STATUTE which provides that every person who owns or harbors dogs within the limits of any city having a specified population in which there exists, or may hereafter exist, an incorporated society for the prevention of cruelty to animals, shall procure a yearly license for each animal and pay the sum of one dollar therefor to such society; that dogs not licensed according to the provisions of the act shall be seized and, if not redeemed within forty-eight hours, destroyed or otherwise disposed of at the discretion of the society; and that the license fees are to be used by the society toward defraying the cost of carrying out the provisions of the statute and maintaining a shelter for lost, strayed, or homeless animals, "and for its own purposes," is unconstitutional so far as it requires the owner of a dog to pay a license fee to the society for its own use. (Fox v. Mohawk and Hudson River Humane Soc., 767.)

4. CONSTITUTIONAL LAW—LICENSE FEE FOR DOGS—PUBLIC MONEYS—GIFTS OF.—License fees required by statute of one who owns or harbors dogs are public moneys, and their appropriation by the statute to a society organized by the voluntary action of individuals alone, violates that section of the constitution which prohibits gifts of money to, or in aid of, any association, corporation, or private undertaking. (Fox v. Mohawk and Hudson River Humane Soc., 767.)

5. CONSTITUTIONAL LAW—OWNING OR HARBORING DOGS—EXCLUSIVE PRIVILEGE.—As the statute providing for

the incorporation of societies for the prevention of cruelty to animals permits the incorporation of but one society in a county, another statute, so far as it empowers such a society to appropriate, harbor, and keep dogs without paying any license fee therefor, while every other citizen is obliged to pay such license fee, is unconstitutional, for the reason that it grants an exclusive privilege and immunity forbidden by the constitution. (*Fox v. Mohawk and Hudson River Humane Soc.*, 767.)

6. CONSTITUTIONAL LAW.—The terms "life," "liberty," and "property" embrace all liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property, and such rights include whatever is necessary to secure and effectuate their full enjoyment. None of these rights or liberties can be taken away except by due process of law. (*Gillespie v. People*, 176.)

7. CONSTITUTIONAL LAW.—RIGHTS OF LIBERTY and of property include the right to acquire property by labor, and by contract, and such right cannot be taken away except by due process of law. (*Gillespie v. People*, 176.)

8. CONSTITUTIONAL LAW.—RIGHT OF PROPERTY involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts, such right being subject only to civil liability for unwarranted termination. (*Gillespie v. People*, 176.)

9. CONSTITUTIONAL LAW.—NO AUTHORITY EXISTS TO PRONOUNCE PERFORMANCE OF INNOCENT ACTS CRIMINAL when the public health, safety, comfort, or welfare is not interfered with. (*Gillespie v. People*, 176.)

10. CONSTITUTIONAL LAW.—LIBERTY INCLUDES NOT ONLY RIGHTS TO LABOR, but to refuse to labor, and consequently, the right to contract to labor or for labor, and to terminate such contracts, and to refuse to make such contracts. (*Gillespie v. People*, 176.)

11. CONSTITUTIONAL LAW — LABOR CONTRACTS.—The legislature cannot prevent persons who are *sui juris* from laboring, or from making such lawful labor contracts as they may see fit, nor has it any power, by penal laws, to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him. (*Gillespie v. People*, 176.)

12. CONSTITUTIONAL LAW — LABOR UNION LAWS.—A statute making it criminal for any employer to attempt to prevent his employé from joining labor unions, or to discharge him because of his connection with a labor union, is unconstitutional and void, as depriving such employer of liberty and property without due process of law. (*Gillespie v. People*, 176.)

13. CONSTITUTIONAL LAW—LABOR UNION LAWS—SPECIAL LEGISLATION.—A statute attempting to make it criminal for an employer to discharge "labor union" employés, when he is not thus liable if he discharges "nonunion" employés, is unconstitutional as being special legislation. (*Gillespie v. People*, 177.)

14. CONSTITUTIONAL LAW—LABOR UNION LAWS—SPECIAL LEGISLATION.—A statute attempting to limit the power of an owner or employer as to his right to contract with, or to terminate his contract with, particular persons as a class, as "labor union" employés, is unconstitutional as special legislation. (*Gillespie v. People*, 177.)

15. CONSTITUTIONAL LAW—CURATIVE ACT AS DEFENSE. A curative statute passed after the commencement of an action disputing the legality of certain proceedings, cured by the passage of such act, is a defense to the action. (*Windsor v. Des Moines*, 280.)

16. CONSTITUTIONAL LAW—CURATIVE STATUTES.—A curative statute, whose preamble refers to certain specified defects, while the body of the act declares that a certain contract for the construction of an electric light plant, and the operation and maintenance thereof, "is hereby legalized as fully as though all requirements of law leading up to and necessary thereto had been followed in every respect, and on full compliance with the law," operates to cure all defects in the preliminary proceedings incident to the making of the contract, but does not necessarily render the contract valid. (*Windsor v. Des Moines*, 280.)

17. STATUTES—CURATIVE—VALIDITY.—THE LEGISLATURE has power to pass a curative statute to correct errors in deeds, mortgages, and other instruments, defectively executed or acknowledged, where the rights of third parties which have been acquired in good faith are saved. (*Wingert v. Zeigler*, 453.)

18. CONSTITUTIONAL LAW—ABOLISHING RIGHT OF ACTION.—Where a right of action springs from contract or from the principles of the common law, it is not competent for the legislature to abolish it. (*Wilson v. Simon*, 427.)

19. CONSTITUTIONAL LAW—CHANGING REMEDY—IMPAIRING CONTRACT.—Whatever belongs to the remedy may be altered at the pleasure of the state, provided the alteration does not impair the obligation of the contract, even though the new remedy is less convenient and more difficult than the old one. (*Wilson v. Simon*, 427.)

20. STATUTES—ENACTMENT.—THE GOVERNOR of the state is part of the law-making power, and in acting on bills presented to him for approval or rejection he is engaged in the performance of a legislative duty enjoined upon him by the constitution. (*Weis v. Ashley*, 704.)

21. CONSTITUTIONAL LAW—STATUTES—CHANGE IN TITLE OF BILL.—A material change in the title or body of a bill after it has passed the legislature, and before it is presented to the governor for his approval or rejection, renders the act unconstitutional and void. (*Weis v. Ashley*, 704.)

22. CONSTITUTIONAL LAW—WAGES OF RESIDENTS—SUIT IN ANOTHER STATE.—A statute providing that any person who shall send out of the state any note, bond, account, or chose in action for the purpose of instituting suit thereon to subject to the payment thereof the wages of any resident of the state, shall be guilty of a misdemeanor, is void, as being repugnant to constitutional provisions prohibiting the state from depriving any person of property without due process of law, or from granting to any person any special or exclusive right, privilege, or immunity, or from denying to its citizens the equal protection of the laws, and providing that the citizens of each state shall be entitled to all of the privileges of citizens in the several states. Such statute is also unconstitutional in that it undertakes arbitrarily to separate natural classes of persons, and to provide different rules of action for each of the dissevered classes thus unwarrantably formed into a class of its own. (*In re Flukes*, 619.)

23. CONSTITUTIONAL LAW—ESTABLISHMENT OF COURTS—LEGISLATIVE POWER AS TO.—A legislature has no power to

establish a court of appeals, aside from constitutional courts, to determine the guilt or innocence of a convicted criminal. Hence, it has no authority by a joint resolution to empower a board of state auditors to investigate a convicted criminal's claim of innocence, where a portion of the sentence has been served, and to allow him a moneyed compensation if it finds him innocent. Such a resolution is unconstitutional and void. (*Allen v. Board of State Auditors*, 573.)

24. **CONSTITUTIONAL LAW—LEGISLATIVE APPROPRIATIONS—REQUISITE VOTE.**—A legislature cannot, by a joint resolution, appropriate the public money or property for local or private purposes, without the two-thirds vote requisite to the validity of a bill for such a purpose. (*Allen v. Board of State Auditors*, 573.)

25. **CONSTITUTIONAL LAW—SENTIMENTAL AND UNJUST CLAIMS AGAINST THE STATE ARE NOT ALLOWABLE.**—A board of state auditors, authorized by the constitution to examine and adjust all claims against the state, has power to pass upon such claims only as rest upon some legal basis. It must confine itself to such claims as are contemplated by the constitution, and cannot consider one based upon sentimental or moral grounds, such as a convicted criminal's claim for damages for his wrongful conviction and imprisonment. (*Allen v. Board of State Auditors*, 573.)

See *Board of Health*, 1; *Corporations*, 28, 27; *Judgment*, 2.

CONTRACT.

1. **CONTRACTS—CONSTRUCTION.**—Written contracts should be construed so as to give them operative effect rather than to destroy them. (*New Memphis Gaslight Company Cases*, 880.)

2. **CONTRACTS—VALIDITY—CHANGE OF LAW.**—If a contract, which contemplates the lapse of several years before all of its terms are carried out, is valid when executed, it must be held to remain valid and enforceable to the end, no matter what changes the law may undergo in the lifetime of the contracts. (*MacMurray v. Sidwell*, 255.)

3. **CONTRACTS FOR LOBBYING.**—A contract by which a person agrees to draft a bill and have it introduced in the legislature, make arguments in its favor before legislative committees, and do all things useful and proper to secure its passage, his compensation to be liberal, but contingent upon the passage of the bill, is vicious, illegal, and void; and there can be no recovery under it, nor as upon an implied contract, nor upon a quantum meruit. (*Richardson v. Scott's Bluff County*, 682.)

4. **CONTRACTS—EXTINCTION OF SUBJECT MATTER.**—All contracts must be construed with reference to their subject matter, and a contract defining an existing relation can have no operation when that relation ceases, for its foundation is gone. (*Blakely v. Sousa*, 821.)

5. **CONTRACTS FOR PERSONAL SERVICES—DEATH.**—If a contract is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or, more generally, if distinctly personal considerations are at the foundation of the contract, the relations of the parties are dissolved by the death of him whose personal qualities constitute the particular inducement to the contract. The rule is here applied to a contract between a bandmaster and a manager of musical organizations. (*Blakely v. Sousa*, 821.)

6. CONTRACTS FOR PERSONAL SERVICES—DEATH OF PARTY.—The duty of the survivor to a contract of a strictly personal nature, requiring peculiar skill in its performance, to perform his covenants terminates with the death of the other party to it. The personal representative of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed and discharged by another. (*Blakely v. Sousa*, 821.)

7. CONTRACTS—ENTIRETY.—Whether negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances and raises a question of fact which is properly passed upon by the jury. (*Weeks v. Crie*, 410.)

8. CONTRACTS—ENTIRETY.—If the circumstances are such as to lead to a reasonable supposition that the parties intended that a whole series should constitute but one trade or transaction, they may be regarded as one entire contract; otherwise not. (*Weeks v. Crie*, 410.)

9. ILLEGAL CONTRACTS—HOMESTEAD ENTRY ON GOVERNMENT LAND—TRUST.—An action which requires the aid of an illegal contract to support it cannot be maintained. Therefore, where a plaintiff, who was entitled to make a homestead entry upon land, entered into a contract with his son, who, without his father's knowledge or consent, had made a fraudulent entry upon the same land, which provided that the son should proceed under his entry, make proofs, and acquire title to the land for the use and benefit of his father, no suit can be maintained to enforce such a trust, since the contract was for the consummation of a fraudulent imposition upon the government. (*Moore v. Moore*, 78.)

See Statute of Frauds.

CONVERSION.

TROVER AND CONVERSION—JOINT TORT FEASORS.—If two or more persons have converted the property of another, the latter may sue them either jointly or severally, and a court of equity will not compel him to pursue one of them rather than the other, who is equally guilty. (*Paxton v. State*, 689.)

See Officers, 7, 24; Wills, 8.

CORPORATIONS.

1. CORPORATIONS—ACTS ULTRA VIRES—RATIFICATION.—A private corporation has no power to lend its credit to another, or to pledge its property to secure the debt of another, in a matter in which it has no interest, or which is not for its benefit. Such acts are ultra vires, and incapable of ratification. (*Wheeler v. Home Sav. etc. Bank*, 161.)

2. CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS—ESTOPPEL.—A private corporation, by mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers, cannot create an estoppel. (*Wheeler v. Home Sav. etc. Bank*, 161.)

3. CORPORATIONS—REPRESENTATION OF OFFICER AS REPRESENTATION OF CORPORATION.—Representations of an officer in a corporation, made in his own interests and against the interests of the corporation, cannot be treated by the person to

whom made as being the representations of the corporation. (*Wheeler v. Home Sav. etc. Bank*, 161.)

4. **CORPORATIONS—PLEDGE OF CORPORATE PROPERTY FOR OFFICER'S DEBT.**—One who, with notice, receives from an officer of a corporation its notes or securities in payment of, or as security for, the personal debt of such officer, acts at his peril, and cannot hold such property as against the corporation or its assignee, if such pledge was not authorized by the corporation. (*Wheeler v. Home Sav. etc. Bank*, 161.)

5. **CORPORATIONS—SPECIAL MEETING—NOTICE.**—Where the by-laws of a corporation do not designate the person by whom a notice of a directors' meeting is to be given, such notice must be given by the secretary, as provided in section 320 of the Civil Code; and a meeting of the directors of which no notice was given to the absentees, and the minutes of which were never approved as provided by the by-laws, is not valid, and the directors assembled can perform no valid corporate act. (*Curtin v. Salmon River etc. Co.*, 132.)

6. **CORPORATIONS—QUORUM—INTERESTED DIRECTOR.** A director is disqualified from acting in any manner in his official capacity, for the purpose of creating an obligation of the corporation in his own favor; hence a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business. (*Curtin v. Salmon River etc. Co.*, 132.)

7. **CORPORATIONS—MORTGAGE TO DIRECTOR.**—A directors' meeting of a corporation, at which there is a bare majority of the directors present, cannot authorize the execution of a corporate note and mortgage to one of the directors present, as security for a past debt due him, whether he voted for the resolution authorizing such action or not. (*Curtin v. Salmon River etc. Co.*, 132.)

8. **CORPORATIONS—MINING—MORTGAGE RATIFIED BY STOCKHOLDERS.**—Ratification cannot give effect to an unauthorized act, unless the person or body making the ratification could in the first instance have authorized the act; hence under a statute making the stockholders of a mining corporation a component part of the power to make a corporate mortgage, the stockholders cannot ratify an invalid mortgage made by the board of directors, since they cannot by any act of their own make a mortgage. (*Curtin v. Salmon River etc. Co.*, 132.)

9. **MUNICIPAL CORPORATIONS—TRANSFER OF FRANCHISE.**—A franchise granted by a city to a telephone company, to maintain its lines in the streets of such city, may be transferred and sold to another corporation without the consent of the municipality, under a statute expressly authorizing corporations to alienate their property. (*Michigan Tel. Co. v. St. Joseph*, 520.)

10. **MUNICIPAL CORPORATIONS—FRANCHISE—POWER TO DESTROY.**—Acceptance of privileges granted by the laws of a state to a telephone company and a franchise granting permission to use its streets duly given by a city, followed by the expenditure of money by the corporation in valuable improvements, constitutes a contract which cannot be impaired or destroyed, unless under power reserved in the grant itself, or conferred by the state constitution. (*Michigan Tel. Co. v. St. Joseph*, 520.)

11. **CORPORATIONS HAVING BUT ONE STOCKHOLDER.**—Though one person owns or controls all the stock in a corporation

and has conveyed to it all of his property, and as president, treasurer, and manager is given complete control of its operations by its by-laws, yet he and the corporation are legally two distinct persons, each having the right to own property and contract debts, and each bound by its and his obligations in regard thereto, as fully as if two distinct natural persons. That the corporation owes its president's debts cannot be conclusively presumed in such case from the fact that, though operating under a corporate name, he was, in fact, still conducting the same business which he owned and operated as an individual. (*Durlacher v. Frazer*, 918.)

12. CORPORATIONS—CONTRACT TO PAY INDIVIDUAL DEBTS.—To establish the existence of a verbal contract on the part of a corporation to pay individual debts, there must be proof of some expression on the part of the debtor, and someone representing the corporation, showing that the minds of the contracting parties, or their agents met and agreed upon the proposition. (*Durlacher v. Frazer*, 918.)

13. CORPORATIONS—CONTRACTS.—The unexpressed intention of a person claiming to act for himself on one part and for a corporation on the other does not constitute a contract. Hence, the mere intention of one who conveys all of his property to a corporation and takes stock therefor, that his individual debts shall be paid out of the proceeds of the corporation, does not bind the latter if there is no actual agreement to that effect between himself and the corporation. (*Durlacher v. Frazer*, 918.)

14. CORPORATIONS CANNOT GIVE AWAY THEIR PROPERTY or transfer it, unless in good faith and for value, if their creditors are thereby left unsecured. They cannot use their entire capital in payment of a private debt of their president, which they are under no legal or moral obligation to pay. (*Durlacher v. Frazer*, 918.)

15. CORPORATIONS—CONTRACTS.—A chattel mortgage on all of the personal property of a corporation to secure the individual debt of its president created previously to its incorporation is not binding against the corporation creditors, unless there is an agreement by the corporation to assume such indebtedness at the time of its incorporation. (*Durlacher v. Frazer*, 918.)

16. CORPORATIONS—CONTRACTS—CONSIDERATION.—The substitution of the corporate name on a note, as principal, in a transaction extending the debt, without consideration to the corporation, where the note was originally given by the president of such corporation for his individual debt, does not bind the corporation as against its creditors. (*Durlacher v. Frazer*, 918.)

17. CORPORATIONS—DEED, WHEN EXECUTED BY.—A deed is executed by a corporation and is not the mere act of its officers, where the instrument on its face purports to be the deed of the corporation, and the in testimonium clause recites that the company has caused its corporate seal to be attached and the deed to be signed by its president and secretary, and the corporate seal is in fact attached, and the president and secretary have signed in their official capacities. (*New Memphis Gaslight Company Cases*, 880.)

18. CORPORATIONS—BONDS—BONA FIDE HOLDER—SURETY.—A surety who pays the debt of a corporation, and receives the note of the corporation for the amount so paid secured by a pledge of bonds of the corporation, is a bona fide holder for value of such bonds, and as such entitled to protection. (*New Memphis Gaslight Company Cases*, 880.)

19. CORPORATIONS—BONDS—PLEDGE OF, BY DIRECTORS. Directors of a corporation have power both to pledge and to sell bonds, which are issued to pay a floating indebtedness for improvements, and to make new improvements, and to retire a previous bond issue, where such directors are authorized by a vote of the stockholders to use the bonds in such manner as in their discretion and judgment is deemed best. (New Memphis Gaslight Company Cases, 880.)

20. CORPORATIONS—PLEDGE OF BONDS TO SECURE DEBT ON WHICH DIRECTOR IS LIABLE.—Directors of a corporation are not disqualified from voting to apply corporate bonds to secure debts of the corporation upon which they are liable, or which are held by corporations in which they are interested, especially where they are in effect authorized so to do by a vote of the stockholders. (New Memphis Gaslight Company Cases, 880.)

21. CORPORATIONS—DIRECTORS DEALING WITH—SECURING THEMSELVES.—A director is not forbidden, by reason of his position, from dealing with the corporation. Hence, where the corporation is a going concern, continuing and expecting to continue business, a director may secure indemnity from it against possible loss from accommodation indorsements he has made for it. (New Memphis Gaslight Company Cases, 880.)

22. CORPORATIONS—DIRECTORS DEALING WITH, CLOSELY SCRUTINIZED.—All transactions between a corporation and its directors, whereby the latter secure benefits, are closely scrutinized by the court, and must be shown to be characterized by the utmost good faith. (New Memphis Gaslight Company Cases, 880.)

23. CORPORATIONS—INSOLVENT—TRUST FUND DOCTRINE.—The doctrine that the assets of an insolvent corporation are a trust fund for the benefit of creditors will not be applied so as to invalidate a pledge of corporate bonds, and the corporation will not be declared insolvent, where the bill which contains such a prayer alleges, and the evidence shows, that the corporation was solvent at the time the bonds were pledged, and would have continued a solvent and going concern but for unforeseen events. (New Memphis Gaslight Company Cases, 880.)

24. CORPORATIONS—SALE OF ALL OF THE PROPERTY UNDER MORTGAGE.—A sale of the entire property of a corporation under a mortgage foreclosure will not be set aside on the ground that the directors in bad faith united with others in purchasing at a greatly reduced price, where the sale was fair, open, and public, the directors were creditors of the corporation, and the sale was forced by other creditors and bondholders of the corporation. (New Memphis Gaslight Company Cases, 880.)

25. CORPORATIONS—SALE OF PROPERTY—PURCHASE BY DIRECTORS.—A director who in good faith loans his credit to the corporation and takes its bonds as indemnity acquires the same right as any other mortgagee to protect himself, even to the extent of being a purchaser at a foreclosure sale, which is rendered inevitable through no fault of his. (New Memphis Gaslight Company Cases, 880.)

26. STATUTES AS TO CONSTRUCTIVE SERVICE UPON CORPORATIONS SHOULD PROVIDE FOR NOTICE.—While the legislature may authorize constructive service of summons to be made upon corporations, especially where the action concerns property located within the state, the method adopted should be reasonably calculated to bring notice home to some of the officers or agents

of the corporation, thus securing an opportunity to be heard and to make a defense. (*Pinney v. Providence Loan etc. Co.*, 41.)

27. STATUTES AS TO CONSTRUCTIVE SERVICE UPON CORPORATIONS—WHEN VOID.—A statute providing that, until a domestic private corporation files with the register of deeds of the county in which its principal office is located a list of its officers upon whom service of process, etc., may be made, such service may be made by leaving a copy of the process, etc., with the register of deeds, is void, as contravening the constitutional provision that no person shall be deprived of his property without due process of law. The corporation is a "person" within the meaning of such provision, and such service does not give it notice and an opportunity to be heard. (*Pinney v. Providence Loan etc. Co.*, 41.)

See Association; Building and Loan Association; Conflict of Laws, 4.

CORPSE.

See Criminal Law, 1, 2.

COSTS.

JUDGMENTS—COSTS LEFT BLANK.—A judgment for a certain amount and costs taxed at blank dollars is not void as to the costs, which may be subsequently taxed and inserted by the clerk of the court. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

See Marriage and Divorce, 6.

COTENANCY.

See Adverse Possession, 6, 7; Partition, 1, 2.

COURT.

PRACTICE—SUBSTITUTION OF VALID FOR VOID ORDERS.—The court has power to substitute a valid order for a former void order, if the substitution is made in time and follows the requirements of the statute. (*Haven v. Owen*, 477.)

See Trial.

CREDITOR'S SUIT.

CREDITOR'S SUIT—MONEY INVESTED IN NOTE AND MORTGAGE.—If a debtor causes a certain note and mortgage, executed by another, to be assigned for the purpose of defrauding the former's creditors, and pays the obligation, in part, himself, his creditors, after obtaining a judgment at law and return of execution *nulla bona*, have a right, to the extent of such payment, to subject the note and mortgage to the payment of his debts. (*Falkenburg v. Johnson*, 369.)

CRIMINAL LAW.

1. CRIMINAL LAW—SALE OF DEAD HUMAN BODIES.—The unauthorized disposition and sale of the dead body of a human being for gain and profit is a common-law misdemeanor of high grade, and *malum in se*. (*Thompson v. State*, 875.)

2. CRIMINAL LAW—ATTEMPT TO SELL DEAD HUMAN BODY.—An attempt to sell, without authority, the dead body of a human being is a misdemeanor, indictable and punishable at common law. (*Thompson v. State*, 875.)

3. CRIMINAL LAW—PRINCIPAL AND AGENT—JOINT WRONGDOERS.—Where a principal and his agent participate as such in the commission of a misdemeanor, they are joint principals, since the criminal law does not recognize this civil relation. (*Thompson v. State*, 875.)

4. CRIMINAL LAW—PUNISHMENT—FINE AND IMPRISONMENT.—Where an offense is punishable by both fine and imprisonment, a trial judge may, after a jury has found a defendant guilty and assessed a fine against him, superadd imprisonment. (*Thompson v. State*, 875.)

5. CRIMINAL LAW—JOINT PRINCIPALS—PUNISHMENT.—Although joint actors in the commission of a crime are jointly tried and convicted, each may be separately punished as if he had committed the offense alone and must respond in full to his own separate sentence. (*Thompson v. State*, 875.)

CROSS-BILL.

See Pleading, 6.

CURATIVE STATUTE.

See Constitutional Law, 15-17.

DAMAGES.

1. DAMAGES—TORT ACTION—INJURY TO FEELINGS.—Mental distress is not a subject for the assessment of damages in a tort action where there was no physical injury to the plaintiff, and no personal injury to him of any kind save to his feelings. (*Gatzow v. Buening*, 17.)

2. DAMAGES—"ACTUAL" AND "COMPENSATORY"—MEANING OF.—The term "compensatory damages" covers all loss recoverable as a matter of right, and is synonymous with the term "actual damages." Pecuniary loss is actual damage; so is bodily pain and suffering. (*Gatzow v. Buening*, 17.)

3. DAMAGES IN A TORT ACTION ARE NOT DIVIDED into actual, compensatory, and exemplary. The jury should be told that full compensatory damages are recoverable, and then be instructed as to their elements. (*Gatzow v. Buening*, 17.)

4. DAMAGES—DISCRETION OF JURY.—When guilt is established in a tort action, the allowance of exemplary damages is in the discretion of the jury, but the allowance of compensatory damages is not a matter in their discretion. (*Gatzow v. Buening*, 17.)

5. DAMAGES—ACTION FOR—NOTICE OF, WHEN UNNECESSARY.—Notice of an action for the loss of money and injury to the feelings, caused by an unlawful conspiracy and the acts done pursuant thereto, is not necessary under the Wisconsin statute, requiring notice to be given of an action to recover damages for an injury to the person, as the statute refers to bodily injuries and such action is not within it. (*Gatzow v. Buening*, 17.)

6. DAMAGES.—THE REMOTE CONSEQUENCES of an act do not generally make a person liable in damages. (*Reiger v. Worth*, 798.)

7. DAMAGES—SALE OF WORTHLESS SEED.—The measure of damages for the sale of seed rice, where the article is guaranteed and proves entirely worthless, and it is too late to plant another rice crop, is the amount which was paid for the rice, the amount expended in the preparation of the soil and for planting

the seed, and a reasonable rent for the land, less the amount for which the land might have been rented for some other crop. (*Reiger v. Worth*, 798.)

8. SALES—FRUIT TREES—BREACH OF CONTRACT.—If a purchaser orders fruit trees of certain varieties, and the vendor agrees, if they cannot be supplied, that he will furnish other varieties equally desirable, but instead of doing so furnishes trees of an inferior variety, the measure of damages is the value that would have been added to the premises if the trees had been of the varieties ordered. (*Hellman v. Pruyn*, 570.)

9. DAMAGES—SALE OF FRUIT TREES—BREACH OF CONTRACT.—IT IS NO DEFENSE, in an action to recover damages of a vendor for selling to the plaintiff fruit trees of a variety inferior to that ordered by him, that the trees had been injured or killed by severe cold weather after the commencement of such action, and that the plaintiff had, therefore, suffered no damage by reason of the defendant's breach of contract. (*Hellman v. Pruyn*, 570.)

10. DAMAGES—FRIGHT AS A BASIS FOR.—Fright alone, unaccompanied by any physical injury, is not a basis for damages. Hence, if a man, without any malicious motive or intending to do any wrong, dresses himself in a woman's clothes, and goes at dusk to a neighbor's house, just "to have a little fun," and follows the latter's wife into her house, but makes no demonstration other than to tap the end of a parasol on the ground or floor, the woman, though so frightened by the man's conduct as to have a miscarriage in about six weeks thereafter, attributable to such fright, cannot recover damages for such person's act, the result of which could not have been contemplated by him. (*Nelson v. Crawford*, 577.)

See *Banks and Banking*, 4-8; *Eminent Domain*, 1-3; *Warehouseman*.

DEAD BODY.

See *Criminal Law*.

DEDICATION.

DEDICATION FOR RELIGIOUS PURPOSES—EVIDENCE OF.—If land in a city has been dedicated to the public, and the plat, which is the only evidence of the dedication, divides the land into three squares, called, respectively, "Public Square," "Seminary Square," and "Meeting-house Square," the dedication of the latter will be held to be for religious purposes only. (*Maysville v. Wood*, 855.)

See *Municipal Corporation*.

DEED.

1. DEEDS—DELIVERY TO THIRD PERSON FOR GRANTEE.—Where a claim of title rests upon the delivery of a deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently or at some future day, the grantor parting and intending to part with all dominion and control over it, so that it would be the duty of the custodian for the grantee, on his behalf, to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. (*Osborne v. Eslinger*, 240.)

2. DEEDS—DELIVERY TO THIRD PERSON FOR GRANTEE—WHAT INSUFFICIENT.—If a deed is placed in the hands

of a third person, as the agent, servant, friend, or bailee of the grantor for safekeeping only, and not for delivery to the grantee, and the fact that the instrument is a deed is not made known to such third person, and the name of the grantee, or other description of him, is not given, if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land, such transfer does not constitute a delivery, and the instrument falls for want of execution. (*Osborne v. Eslinger*, 240.)

3. **DEEDS—DELIVERY—CUSTODY OF THIRD PERSON.**—Where a grantor signs and acknowledges deeds which she keeps in her possession for two years, when she hands a package containing such deeds and her will to an aged relative, with instructions to take care of such papers until her death and then deliver them to the one who was to settle her estate, and later she took the package from such relative and kept it in her possession, telling her relative if she got sick to take care of the papers, and in case of her death to deliver them to the one who settles her estate, such acts do not constitute a delivery of the deeds to the grantees. (*Osborne v. Eslinger*, 240.)

4. **DEEDS—DELIVERY ESSENTIAL.**—Even in the case of a voluntary deed of settlement, delivery is essential to the validity of the deed, and it must be made either to the grantee or to some third person for his use. (*Osborne v. Eslinger*, 240.)

5. **CONVEYANCES—RESERVATION OF CONTROL OF PROPERTY.**—A condition in a deed reserving to the grantors a life estate, with the absolute control of the real estate the same as if no conveyance had been made, is not inconsistent with the grant of a remainder in fee, since such control relates solely to the use, enjoyment, and management of the land, and does not authorize the life tenants to impair the remainderman's title by another conveyance. (*Haines v. Weirick*, 251.)

6. **CONVEYANCES—CONSIDERATION—PAYMENT ON BECOMING OF AGE.**—Where the consideration for a conveyance of land is to be paid to the grantor's grandson when he becomes of age, such postponement is made solely for the benefit of the debtor; payment is to be made absolutely, and is not conditional on the grandson attaining the age of twenty-one years. Hence, if he dies before reaching such age, his heirs are entitled to recover the amount at the time the grandson would have become of age had he lived. (*Haines v. Weirick*, 251.)

See Corporations, 17; Trust, 8.

DEMURRER.

See Pleading, 7, 8.

DEPOSITION.

EVIDENCE.—DEPOSITIONS which are to be read by agreement in one case cannot, in the absence of agreement to that effect, be read in a subsequent action between the same parties commenced after a nonsuit is suffered in the first action. (*Acme Mfg. Co. v. Reed*, 832.)

DIVORCE.

See Marriage and Divorce.

DOGS.

See Animals; Constitutional Law, 3, 4.

EMBEZZLEMENT.**EMBEZZLEMENT BY PUBLIC OFFICERS—INTENT.—**

It is not necessary to constitute the offense of embezzlement by a public officer, under a statute which makes it a felony for him to knowingly and unlawfully appropriate to his own use, or to the use of any other person, money received by him in his official capacity, that there should be an intent to so appropriate it as "to forever exclude the rightful owner from its use and possession." The intention of such a statute is to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the one for which it came to him. If he does knowingly use it, or permits others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute. (*People v. Warren*, 582.)

EMINENT DOMAIN.

1. EMINENT DOMAIN—TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE—DAMAGING IS A TAKING.—If a railroad is so constructed that it unreasonably obstructs ingress and egress to and from a street, and its prudent operation causes smoke, soot, and cinders to be thrown in and upon the property of abutting owners, the injury thus resulting is a taking of private property for a public use, for which compensation must be made. (*Ball v. Maysville etc. R. R. Co.*, 362.)

2. EMINENT DOMAIN—DAMAGE TO PROPERTY BY RAILROAD COMPANY—LIEN OF OWNER UPON ROAD.—If a railroad company takes private property for a public use by so constructing its road in a street as to injure the property of an abutting owner, the latter has a lien upon the entire road in the nature of a vendor's lien to secure payment of the damages thus resulting to him. Such lien must exist on the entire road, for the reason that there cannot be a sale of only that part of it which fronts on the property without serious injury to the owners of the road and the rights of the public. (*Ball v. Maysville etc. R. R. Co.*, 362.)

3. EMINENT DOMAIN—LIEN OF JUDGMENT CREDITORS FOR DAMAGES—PRIORITY OF.—The lien of creditors, who have obtained judgments for damages for injuries caused by a railroad's taking of private property, on a public street, for a public use, is superior to the claims of all others except those of a similar nature. It is, therefore, superior to any rights of a purchaser or lessee of the road. (*Ball v. Maysville etc. R. R. Co.*, 362.)

4. INJUNCTION AGAINST LESSEE OF RAILROAD.—If property abutting on a street is injured by the construction of a railroad therein, and the owner has obtained a judgment for damages therefor, he may, after a return of no property found, institute an equitable action in which one claiming subordinate rights in the road may be enjoined from using it, and in which a receiver for the company's road and property may be appointed. (*Ball v. Maysville etc. R. R. Co.*, 362.)

5. JUDGMENT—RIGHT TO ENFORCE IN EQUITY—WAIVER OF.—Owners of abutting property, who have been injured by the construction of a railroad in a street, and who have obtained judgments for damages therefor against the railroad company, do not lose their right to enforce the judgments in equity, or waive their liens, because they did not, at the time of obtaining their judgments, also obtain personal judgments, as they might have done, against another railroad company claiming a subordinate right in the road. (*Ball v. Maysville etc. R. R. Co.*, 362.)

EQUITABLE CONVERSION.

See Wills, 8.

EQUITY.

See Marriage and Divorce.

ESTATE OF DECEDENT.

See Executor and Administrator.

EVIDENCE.

1. EVIDENCE—OBJECTIONS TO.—If a party has seasonably objected to evidence of a certain character by one witness, and his objection has been overruled, he is not required to repeat his objection when testimony of the same kind is offered by another witness. (*Schlerbaum v. Schemme*, 604.)

2. CRIMINAL TRIAL—EVIDENCE OF IDENTITY OF DEFENDANT.—Where the evidence as to the identity of the defendant in a criminal case is more than a scintilla, it should be received, even though it is little more than shadowy, and it is for the jury to pass upon its weight. (*State v. Costner*, 809.)

3. EVIDENCE—DECLARATIONS OF HUSBAND, WHEN NOT ADMISSIBLE AGAINST WIFE.—Under a statute declaring that neither a husband nor wife shall be a witness against the other except in a criminal prosecution, his declarations, after making a conveyance to her, are not admissible against her for the purpose of showing that it was fraudulent. (*Cedar Rapids Nat. Bank v. Lavery*, 325.)

4. EVIDENCE—DECLARATIONS AS TO PEDIGREE.—Declarations of deceased members of a family, made ante litem motam, are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events. (*Young v. Shulenberg*, 730.)

5. EVIDENCE—DECLARATIONS CANNOT BE RECEIVED AS EVIDENCE OF PEDIGREE until it is first shown by evidence, independent of the declarations, that the person who made them was a member of the family, and that he is dead, incompetent, or beyond the jurisdiction of the court, but slight proof of the relationship is sufficient. (*Young v. Shulenberg*, 730.)

6. EVIDENCE AS TO PEDIGREE—RECITALS IN DEED.—When there is a recital by the grantor in a deed over eighty years old that a certain person died intestate and seised of the premises, leaving the grantor and her cograntors as his widow and heirs at law, the facts that the family name was identical, that the deed was acknowledged in a foreign country before a minister of the United States thereto, and that the last grantee had custody of the deeds showing title in such intestate by conveyances running back to, and including, the original patent, are, in the absence of rebutting evidence, sufficient to establish that the grantor and her heirs were members of the family, and hence in a position to speak on the subject of pedigree. (*Young v. Shulenberg*, 730.)

7. EVIDENCE—PRESUMPTIONS—PROOF OF PEDIGREE.—If a deed over eighty years old, executed by a resident of a foreign country, contains recitals by the grantor as to pedigree, the presumption is that the grantor was of full age at the time of acknowledgment, and it must be assumed, in proving the grantor's relationship with the family of the prior owner, that the grantor, if liv-

ing at the time of trial, was beyond the jurisdiction of the court, as continuity of residence is presumed in the absence of evidence, but, owing to the long lapse of time, the presumption is that the grantor was not then alive. (*Young v. Shulenberg*, 730.)

8. EVIDENCE OF PEDIGREE—PRESUMPTIONS.—Cases of pedigree are peculiar, in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed; and while presumptions "should be weighed with care and applied with caution" in all cases, yet in a case involving a transaction which occurred nearly three generations ago, necessity may compel their use to prevent a failure of justice. (*Young v. Shulenberg*, 730.)

9. EVIDENCE OF PEDIGREE—PRESUMPTIONS—AID OF, WHEN PROPER.—In an action of trespass for entering upon the lands of the plaintiff and cutting down and carrying away trees therefrom, where the defendant stands before the court as a naked trespasser, unless he can pick some flaw in the plaintiff's title, and where the plaintiff, in establishing title, relies upon proof of pedigree, the difficulty of proof by the party asserting the fact of relationship, as well as the attitude of the party denying it, should be considered and the former aided by resort to presumptions, when supported by strong reasons, where the latter makes no claim to the subject of litigation, but attempts to defend a wrong inflicted upon some one by insisting that it may not have been the plaintiff whom he wronged, but some person unknown. (*Young v. Shulenberg*, 730.)

10. EVIDENCE.—PLEADINGS IN ONE SUIT are admissible in evidence in another suit when offered as admissions or declarations against interest, but when such pleadings are not signed or verified by the party himself, they can be received only upon actual or presumptive proof that the admissions which they contain were either made by his direction or were afterward sanctioned by him. (*Paxton v. State*, 689.)

11. EVIDENCE—BOOK ENTRIES.—An officer who has held a certain office for a considerable time is presumably competent to give an opinion as to the meaning of entries in books evidencing business transactions in his office. (*Paxton v. State*, 689.)

12. EVIDENCE—MUNICIPAL ORDINANCES.—In an action based on the violation of a city ordinance it is not necessary, in order to introduce the ordinance in evidence, to allege and prove the incorporation of the city, that it has a special charter, or the class to which it belongs, as the court takes judicial notice of these facts. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

13. EVIDENCE—MUNICIPAL ORDINANCES.—If a book, duly labeled, containing an ordinance upon which an action is based, is produced by the mayor of the city, who testifies that it is the journal of the proceedings of the board of aldermen, including the city ordinances as adopted, such book and ordinance are thereby rendered admissible in evidence. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

See Deposition; False Imprisonment, 5, 6; Fraudulent Conveyance, 1; Libel, 7-12.

EXCEPTIONS.

See Appeal, 5, 8.

EXECUTION.

EXECUTIONS—SALES UNDER—RECORD OF LEVY.—A levy on land under an execution is not effectual against a subsequent purchaser from the judgment debtor, without notice of such levy, unless it is recorded as provided by statute, but such unrecorded levy, if followed by a regular sale, as against the judgment debtor, conveys title to the purchaser. (*Swift v. Guild*, 406.)

See *Homestead*, 6; *Mandamus*.

EXECUTOR AND ADMINISTRATOR.

1. JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—COLLATERAL ATTACK.—The proceedings of a county court in matters of probate and administration are not conclusive as to the jurisdiction of the court, because such jurisdiction may be collaterally called in question where the proper averments are made. (*Hall v. Louisville etc. R. R. Co.*, 358.)

2. JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—WANT OF.—When a plaintiff, as administrator, brings an action for damages for the negligent killing of his intestate in another state, and the petition itself affirmatively shows facts which would deprive a county court of jurisdiction to grant administration, the question of want of jurisdiction in the county court may be raised by special demurrer to the petition; otherwise, the question should be raised by plea to the jurisdiction and the demurrer be overruled. (*Hall v. Louisville etc. R. R. Co.*, 358.)

3. JURISDICTION OF COUNTY COURT TO GRANT ADMINISTRATION—NONRESIDENT NEGLIGENTLY KILLED IN ANOTHER STATE.—A county court of Kentucky is not authorized to appoint an administrator of a nonresident, negligently killed in another state, for the sole purpose of bringing an action in Kentucky upon a cause of action created by the statutes of such foreign state, although the statutes of Kentucky show legislation of a kindred nature. (*Hall v. Louisville etc. R. R. Co.*, 358.)

4. ESTATES OF DECEASED PERSONS—SALE OF LAND—SUIT FOR PURCHASE PRICE.—The administrator of an estate may maintain a suit to recover the purchase price against a purchaser of land belonging to the estate which was sold at a probate sale; the special remedy given by the probate law for a resale of the property is not exclusive. (*Crouse v. Peterson*, 89.)

5. ESTATES OF DECEDENTS.—The property of the estate of a decedent is bound for the payment of his debts as far as it will go. (*First Nat. Bank v. Ludvigsen*, 928.)

6. EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—The administrator of an insolvent estate, as representative of the creditors, occupies the same position as the creditors themselves in respect to the avoidance of a void chattel mortgage, and is not affected by the fact of its validity as against the decedent. (*First Nat. Bank v. Ludvigsen*, 928.)

7. EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—It is not essential to an avoidance by an administrator of a void chattel mortgage executed by his decedent that a creditor of the estate should have secured a lien by judgment or process. (*First Nat. Bank v. Ludvigsen*, 928.)

8. EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGE.—An administrator of an insolvent estate

may in replevin against him defend his possession against a chattel mortgage by showing its invalidity as against creditors of the estate. (*First Nat. Bank v. Ludvigsen*, 928.)

9. EXECUTORS AND ADMINISTRATORS—AVOIDANCE OF CHATTEL MORTGAGES.—A statute authorizing actions for the recovery of property by and against administrators in all cases where they might have been maintained by or against the intestate does not interfere with the rights of creditors nor affect the right of the administrator of an insolvent estate to recover or defend possession of mortgaged chattels on the ground of the invalidity of the mortgage as against creditors of the estate. (*First Nat. Bank v. Ludvigsen*, 928.)

10. STATUTES—COLLECTION OF CLAIMS AGAINST ESTATES OF DECEDENTS—EXCLUSIVE REMEDY.—A statute giving a remedy for the collection of claims against the estates of deceased persons, and fixing a time limit for their presentation to the court, furnishes the exclusive remedy for the collection of such claims. (*Fields v. Mundy*, 39.)

11. LIMITATIONS OF ACTIONS—CLAIMS AGAINST ESTATES OF DECEDENTS—NONRESIDENTS—FOREIGN JUDGMENT.—A claim against the estate of a deceased person, not presented to the court within the time limited by the statute of the state for that purpose, is forever barred; and the bar of the statute covers all claims, whether belonging to residents or nonresidents, and whether put in judgment in a foreign court or in a court of this state, before being filed in the probate proceedings. The full faith and credit clause of the federal constitution does not apply to such a case. (*Fields v. Mundy*, 39.)

See Wills, 7-9; Witness, 1.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT—ARREST IN CIVIL ACTION.—An action for false imprisonment will lie against one who in a civil action secures the arrest of the plaintiff as his alleged debtor, upon an affidavit materially defective in respect to the jurisdictional facts required to be stated to bring the case within the statute providing for the arrest. (*Fukumoto v. Marsh*, 73.)

2. FALSE IMPRISONMENT—LIABILITY OF POLICE JUDGE.—If a person is arrested by a city marshal simply on the strength of a telegram from another state, a police judge has no jurisdiction or authority to commit him to jail, where there is no charge against him or warrant of any kind, and if he does so commit him without hearing any evidence of his guilt, he is answerable therefor in an action of false imprisonment, although he may not have been actuated by improper or corrupt motives. (*Glazar v. Hubbard*, 340.)

3. FALSE IMPRISONMENT.—UNJUSTIFIABLE IMPRISONMENT, without process, is false imprisonment. (*Bergeron v. Peyton*, 33.)

4. FALSE IMPRISONMENT.—IT IS NOT JUSTIFIABLE to arrest and detain a person who has received overpayment on a check from a bank, merely to compel repayment, and not for the purpose of taking him before a magistrate, and it is, therefore, false imprisonment. (*Bergeron v. Peyton*, 33.)

5. FALSE IMPRISONMENT—EVIDENCE.—IT IS ERROR, in an action for false imprisonment, to permit the plaintiff to testify

that he is a married man and has a family, for it is calculated to improperly increase the damages. (*Bergeron v. Peyton*, 33.)

6. **FALSE IMPRISONMENT—EVIDENCE.—IT IS ERROR**, in an action for false imprisonment, where the plaintiff was arrested and detained for the sole purpose of compelling him to repay an overpayment received from a bank by him, to permit him to prove that, subsequently to his arrest, the defendant commenced a civil action against him and garnished the chief of police, who was supposed to have the money. (*Bergeron v. Peyton*, 33.)

7. **FALSE IMPRISONMENT—INSTRUCTIONS.—IT IS ERROR**, in an action for false imprisonment, where the court has limited the recovery to compensatory damages, and no special damages are alleged, to instruct the jury to consider the question of injury to the plaintiff's reputation, and assess such sum as will fairly compensate him for "the injury, if any, to his reputation." (*Bergeron v. Peyton*, 33.)

8. **FALSE IMPRISONMENT—INSTRUCTIONS.—IT IS ERROR**, in an action for false imprisonment, to instruct the jury not to return a verdict for a mere nominal amount; that if the plaintiff was falsely imprisoned, he is "entitled to substantial damages," if any; and that they are the judges of how much that should be. (*Bergeron v. Peyton*, 33.)

FALSE PRETENSE.

See Conspiracy.

FIRES.

See Negligence, 2; Railroad, 9-12.

FISH AND GAME.

See Game.

FORGERY.

1. **FORGERY—FALSE POWER OF ATTORNEY.—A** defendant, who procures a power of attorney from one Elmer Geddes, signed and acknowledged under the name of E. Geddes, with the intent that it shall represent and bind Edwin Geddes who has a bank account evidenced by a bank-book in the name of E. Geddes, is guilty of forgery, where, under the power of attorney, he sells the bank account with intent to defraud the purchaser and receives a check therefor payable to the order of E. Geddes, and indorses such check in the name of E. Geddes, by himself as attorney in fact. (*People v. Rushing*, 141.)

2. **FORGERY—SIGNING ONE'S OWN NAME.—A** man may be guilty of forgery by making a false instrument in his own name, if the name was placed thereon with the fraudulent intent of making the instrument appear to bind another, and of making the writing purport to be the writing of another. (*People v. Rushing*, 141.)

FRANCHISE.

See Corporations, 9, 10.

FRAUD.

1. **FRAUD — FALSE REPRESENTATIONS — QUESTION OF LAW.—The** question whether or not a false representation is material, no matter whether it is relied upon by a plaintiff to sup-

port an action of deceit, or by a defendant to avoid a contract, because of deceit, is one of law for the court, and not of fact for the jury. (*Greenleaf v. Gerald*, 377.)

2. **FRAUD—FALSE REPRESENTATIONS AS GROUND FOR AVOIDING CONTRACT.**—If an agent of a publisher obtains a subscription for a biographical work to be published, and falsely represents to the subscriber at the time that only three other residents of the town in which the subscriber lives will be solicited to become subscribers for such work and to have their biographies and portraits published therein, and that the portraits and sketches of only three hundred persons in all will be published therein, such misrepresentations are material and grounds for avoiding the contract of subscription induced thereby. (*Greenleaf v. Gerald*, 377.)

See *Homestead*, 3.

FRAUDULENT CONVEYANCE.

1. **FRAUDULENT CONVEYANCES — EVIDENCE.** — **DECLARATIONS AND ADMISSIONS** of a grantor made after a conveyance are not admissible against the grantee in an action to set aside the conveyance as fraudulent. (*Cedar Rapids Nat. Bank v. Lavery*, 325.)

2. **FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—DECLARATIONS AS EVIDENCE.**—In an action to set aside a conveyance of real estate from husband to wife as in fraud of his creditors, his declarations, oral and written, made before the indebtedness was incurred, that he had used his wife's money in purchasing the property conveyed, and that he held the title there-to in trust for her, are admissible in evidence in her favor, when he is dead, and there is no motive for falsifying the facts. (*German Ins. Co. v. Bartlett*, 172.)

See *Conflict of Laws*, 3; *Pleading*, 9; *Pension*.

FRIGHT.

See *Damages*, 10.

FUGITIVE FROM JUSTICE.

See *Arrest*, 3.

GAMBLING CONTRACT.

See *Negotiable Instrument*, 6.

GAME.

FISH AND GAME—POWER OF STATE OVER.—The fish and wild game in a state belong to the people thereof in their sovereign capacity, and they may either permit or prohibit their taking. If the state permits the taking of fish and game, it has full authority to regulate such taking, and may impose such conditions, restrictions, and limitations as it deems needful or proper. (*State v. Snowman*, 380.)

GIFT.

GIFTS—DELIVERY.—To constitute a gift there must be a delivery to the donee or an express declaration of trust in his favor. (*Getchell v. Biddeford Sav. Bank*, 408.)

See *Insurance*, 6; *Husband and Wife*, 1, 2.

GUARANTY.

1. **GUARANTY—NOTICE OF ACCEPTANCE.**—A guarantor of a future credit or advance is entitled to notice from the party giving the credit of his acceptance of the guaranty, unless the agreement to accept is contemporaneous with it. Without such notice there is no contract. (*Acme Manufacturing Co. v. Reed*, 832.)

2. **GUARANTY—NOTICE OF ACCEPTANCE.**—A guarantor of the payment of an order for goods is not liable to the guarantee without notice of his acceptance of the order, although the latter contains a stipulation that it shall be considered as accepted unless notice to the contrary is given within a specified time. In such case acceptance of the order by silence is not notice to the guarantor of the acceptance of the guaranty. (*Acme Manufacturing Co. v. Reed*, 832.)

See Suretyship.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—LIABILITY OF SURETIES.**—Sureties of a curator are liable only for money or property that actually came into his hands during the term covered by the bond on which they are sureties, and the mere statements of the curator in his settlements that the money or property was in his hands are presumptive evidence only, and not conclusive on the sureties that such was the fact. (*State v. Elliott*, 643.)

2. **GUARDIAN AND WARD—LIABILITY OF SURETIES—CONVERSION OF TRUST FUNDS.**—If a curator deposits the funds of his ward in bank in his own name and mingles them with his own, this instantly constitutes a conversion of such funds, for which his sureties for that period are liable as against his sureties upon a subsequent bond who prove a misappropriation of the trust funds before their bond was given, and that no trust funds actually came into the curator's hands during the period for which they were liable for his acts, notwithstanding his statements made in his settlements to the contrary. (*State v. Elliott*, 643.)

GUIDES.

See Constitutional Law, 2.

HABEAS CORPUS.

1. **HABEAS CORPUS IS A PROPER** remedy to restore a person to his freedom of which he has been improperly and illegally deprived for an act which is not in contravention of any existing law, or if the statute under which he is held is unconstitutional. (*Ex parte Neet*, 638.)

2. **HABEAS CORPUS—SUNDAY—BASEBALL.**—Habeas corpus is the proper remedy for obtaining the discharge of a person illegally imprisoned and held for playing baseball on Sunday. (*Ex parte Neet*, 638.)

HOMESTEAD.

1. **HOMESTEADS—ACKNOWLEDGMENT OF MORTGAGE.**—The homestead of a married person cannot be encumbered by a mortgage not acknowledged by both husband and wife. (*Council Bluffs Sav. Bank v. Smith*, 669.)

2. **HOMESTEAD — COMMUNITY PROPERTY — MORTGAGE TO HUSBAND.**—Under a statute forbidding the mortgage of community property upon which a homestead has been declared unless

such mortgage is executed by both husband and wife, a mortgage of such property signed by the wife alone to her husband, to secure an indebtedness from her to him, is void even in the hands of an assignee. (*Freiermuth v. Steigleman*, 138.)

3. **HOMESTEAD — MORTGAGE BY WIFE — ESTOPPEL.**—A wife, who has executed a mortgage to her husband on community property upon which a homestead has been declared, is not estopped from denying the validity of such mortgage in the hands of an assignee, who had constructive notice of the homestead, and actual notice that the mortgage was executed by the wife alone. (*Freiermuth v. Steigleman*, 138.)

4. **HOMESTEAD—JUDGMENT LIEN—PRIORITY.**—Where the head of a family, against whom exists a judgment of a court of record, purchases land, his homestead right attaches at the same time the lien of the judgment does, but is superior to it. (*Maples v. Rawlins*, 903.)

5. **HOMESTEAD—FRAUD ON CREDITORS—WIFE'S MONEY.** The purchase of land as a homestead by a debtor, with money furnished by his wife and sons, is not a fraud upon his creditors. (*Maples v. Rawlins*, 903.)

6. **HOMESTEAD—EXECUTION.**—A judgment debtor who has acquired an additional interest in real property after execution has been levied is not thereby deprived of his homestead exemption, and such acquisition is not a fraud on the creditor's rights, even though by docketing his judgment the creditor has acquired a lien upon the land. (*Wright v. Bond*, 781.)

See Contract, 9; Mechanic's Lien, 2, 3.

HOMICIDE.

1. **HOMICIDE—INDICTMENT—CAUSE OF DEATH.**—Where the evidence before a grand jury points clearly to the commission of a murder by the accused, but from such evidence they are in doubt as to the cause of death, a count of the indictment may be framed alleging that the death was caused in some manner to them unknown. (*Waggoner v. State*, 237.)

2. **HOMICIDE—INDICTMENT—ALLEGING ASSAULT.**—In an indictment for murder, it is unnecessary to charge, in formal and express terms, an assault or an assault and battery. (*Waggoner v. State*, 237.)

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE—GIFTS—DELIVERY.**—If a husband with his own money buys corporate stock and has the certificates made out in the name of his wife, but holds them without delivery to her, or expressly declaring a trust in her favor, the title to the stock does not vest in her. (*Getchell v. Biddeford Sav. Bank*, 408.)

2. **HUSBAND AND WIFE—GIFTS—DELIVERY.**—If a husband deposits his own money in bank in the name of his wife, without delivering the bank-book to her, or expressly declaring a trust in her favor, such money does not vest in her. (*Getchell v. Biddeford Sav. Bank*, 408.)

3. **HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR.**—A husband has a right to prefer his wife to his other creditors, provided the preference is based upon a valuable consideration and is made in good faith. (*German Ins. Co. v. Bartlett*, 172.)

4. HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR—ESTOPPEL AGAINST WIFE.—A wife who secures the legal title to property, of which she is the equitable owner, before creditors of her husband reduce their claims to judgment, is not estopped to assert title against them by reason of her not recording a declaration of trust as soon as she received it from her husband, and not recording her deed from her husband as soon as she received it, when it does not appear that she, in any way, misled such creditors, or withheld such instruments from record by reason of any agreement with her husband. (*German Ins. Co. v. Bartlett*, 172.)

5. HUSBAND AND WIFE—ALIENATION OF AFFECTION BY PARENTS.—While a parent may not, with hostile, wicked, or malicious intent, break up the marital relations between his daughter and her husband, simply because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer, yet he may advise his daughter in good faith and for her good to leave her husband, if the father, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving her husband. In such case, a parent may persuade his daughter, and use all proper and reasonable arguments, but the motive and the means employed are always to be considered. It may be shown that the parent acted upon mistaken premises or upon false information, or his advice and interference may have been unfortunate, still if he acted in good faith and for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband. (*Oakman v. Belden*, 396.)

6. HUSBAND AND WIFE—ALIENATION OF AFFECTION BY PARENTS.—In an action to recover for the alienation of a wife's affection, an instruction that if the separation of plaintiff's wife from him was the result of the active interference of her parents, either by threats, persuasion, or argument, then they are liable, is erroneous, as it places upon such parents a much more grievous burden than they are compelled to bear in order to justify their action. (*Oakman v. Belden*, 396.)

See *Homestead*, 2-5; *Fraudulent Conveyance*, 2; *Evidence*, 3; *Pension*, 2.

INDICTMENT,

1. INDICTMENT, WHEN CHARGES BUT ONE OFFENSE.—AN INDICTMENT which charges the defendants with making a joint and unlawful attempt to dispose of a dead human body for profit charges but one offense, notwithstanding it states a failure to bury the body and a conspiracy not to bury it, since these statements are in the nature of a description or inducement, a mere narrative of the facts leading up to the main offense. (*Thompson v. State*, 875.)

2. CRIMINAL LAW.—AN INDICTMENT CHARGING BUT ONE OFFENSE, and closely following the language of the statute claimed to be violated, so that the offense charged and the statute under which the indictment is found can be clearly identified and understood, is neither insufficient in law nor bad for duplicity. (*State v. Snowman*, 380.)

See *Homicide*.

INJUNCTION.

INJUNCTIONS—USE OF LABEL.—The use of the name and likeness of a deceased person as a label for a certain brand of cigars named after him cannot be restrained by injunction, so long as they do not constitute a libel. (*Atkinson v. Doherty*, 507.)

See Eminent Domain, 4.

INSTRUCTION.

1. **TRIAL—INSTRUCTIONS—EVIDENCE.**—The jury should be instructed to draw their conclusions from the evidence alone, and it is error not to so instruct, but it is a nondirection and not a misdirection, and if a party desires an instruction on this point, he must present it, and request that it be given. Otherwise, there is no ground for a reversal of the judgment. (*Burr v. McCallum*, 677.)

2. **TRIAL—CRIMINAL—AN INSTRUCTION** that "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been," while open to criticism, is corrected by a special instruction "that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved." (*People v. Rushing*, 141.)

3. **CRIMINAL LAW—TRIAL—INSTRUCTIONS.**—If a person is charged in an indictment with having been unlawfully engaged in the business of acting as a guide, the question whether he was so engaged is exclusively for the jury. A single act of guiding, with proof of other circumstances, may satisfy them of the truth of the charge, while proof of two or more acts of guiding, with other facts, might fail to satisfy them. Hence an instruction that if a person acts as guide one or more times, not being licensed as required by statute, he is guilty, is erroneous and ground for reversal. (*State v. Snowman*, 380.)

INSURANCE.

1. **INSURANCE—ACCIDENTS—AMPUTATION OF "LIMB"—MEANING OF.**—If a member of a mutual benefit association is insured against an injury which alone shall cause the "amputation of a limb [whole hand or foot]," the injury insured against is not the amputation or "loss" of a hand or foot, but the amputation of a "limb," not necessarily a whole arm or leg, but any amputation of a limb which shall include a whole hand or a whole foot. (*Fuller v. Locomotive Engineers' etc. Assn.*, 598.)

2. **INSURANCE — ACCIDENTS — AMPUTATION OF PART ONLY OF A FOOT—NO RECOVERY.**—A member of a mutual benefit association, insured therein against an injury which shall cause the "amputation of a limb [whole hand or foot]," cannot recover where a part only of a foot is amputated. (*Fuller v. Locomotive Engineers' etc. Assn.*, 598.)

3. **INSURANCE—LIFE—UNCONSCIOUS MISREPRESENTATIONS.**—In the absence of explicit, unequivocal stipulations, requiring such an interpretation, it cannot be inferred that the insured took, or the insurer issued, a life insurance policy with the distinct understanding that it should be void if any statements made in

the medical examination should be false, whether the insured was conscious of the falsity thereof or not. (*Globe Mut. Life Ins. Assn. v. Wagner*, 169.)

4. **INSURANCE—LIFE—REPRESENTATIONS NOT WARRANTY.**—A statement in a medical examination by an applicant for life insurance that none of his brothers are dead is a representation and not a warranty, and if proved to be false, does not vitiate the policy, in the absence of proof of fraud or intentional misstatement on the part of the insured. (*Globe Mut. Life Ins. Assn. v. Wagner*, 169.)

5. **INSURANCE—LIFE—PAID-UP POLICY IN PROPORTION TO PREMIUMS.**—A person whose life has been insured is entitled to a judgment for a nonparticipating paid-up policy, where the original policy distinctly provides that the insured shall be entitled to such a paid-up policy, in proportion to the premiums paid, after having made three annual payments, if he surrenders the original policy before default, or within six months after default in the payment of premiums, although he fails to surrender the original policy within six months after default, and to demand the issuing of the other within that time. (*Mutual Life Ins. Co. v. Jarboe*, 343.)

6. **A PAROL GIFT OF A LIFE INSURANCE POLICY** may be made by a physical delivery of the policy to the donee, without a written assignment thereof. (*Hani v. Germania Life Ins. Co.*, 819.)

7. **BENEFIT SOCIETIES—PLACE OF CONTRACT.**—Where a policy of insurance, issued by a benefit society chartered in one state, is delivered to the insured by the society's agent in another state, and the assessments and dues are to be paid to, and the claim of the beneficiary is to be paid by, such agent, the contract is made and to be performed in the latter state, and the rights of the parties are to be determined by the law of such state. (*Expressman's Mut. Ben. Assn. v. Hurlock*, 470.)

8. **BENEFIT SOCIETIES—DEATH OF BENEFICIARY BEFORE INSURED—WHO ENTITLED TO FUND.**—The administrator of the beneficiary named in a policy of insurance issued by a mutual benefit society is entitled to recover the amount of such policy as against the executrix of the insured member of the society, even though such beneficiary died before the insured, where the insured member had made no appointment of a new beneficiary before his death. (*Expressman's Mut. Ben. Assn. v. Hurlock*, 470.)

9. **INSURANCE—UNKNOWN BREACH OF CONDITIONS—WAIVER OF.**—It is possible to waive an unknown breach of the conditions of a contract of insurance equally with one that is known, when the failure of knowledge is due to the fault of the party on whom it is sought to impose the waiver. (*Skinner v. Norman*, 776.)

10. **INSURANCE—WAIVER OF RIGHTS—KNOWLEDGE OF FACTS.**—One will not be held to have waived his rights under an insurance contract, unless it is shown that he has acted with a full knowledge of the facts, or that it was his bounden duty to know them. (*Skinner v. Norman*, 776.)

11. **INSURANCE—FIRE—ENCUMBRANCE—KNOWLEDGE OF AND WAIVER OF CONDITION AS TO.**—If negotiations for insurance upon a steamboat, encumbered by a chattel mortgage, are made between a representative of the owner and the agent of the insurance company, and the owner's representative, upon being asked if there are any claims against the boat, answers that he knows of none, but that if there are any, the insurance agent can find out by inquiry of the owner, which inquiry the agent promises

to make, but fails to do so, and the policy is subsequently issued without any reference to the chattel mortgage, which is not indorsed thereon or added thereto as required by one of its conditions, it is no defense to an action upon the policy for a loss that the chattel mortgage was not indorsed thereon or added thereto, for the defendant should not be allowed to plead ignorance of a fact as to which it agreed to obtain knowledge. The lack of inquiry of the owner as to encumbrances made that question immaterial, and having issued the policy without it, it was a waiver of the condition requiring such indorsement. (*Skinner v. Norman*, 776.)

12. **INSURANCE—NOTICE OF FORFEITURE.**—Notice to the insured by the insurer, who has issued two policies to the former, stating the aggregate amount required to pay customary short rates and expenses, in order to cancel both policies, and the amount of premium due under a note given for unpaid premiums on both policies, but not stating the amount required on each policy separately, is insufficient to forfeit or suspend one of the policies alone for nonpayment under such notice. (*Born v. Home Ins. Co.*, 300.)

13. **INSURANCE—MORTGAGE CLAUSE—FORFEITURE.**—A policy insuring both real and personal property, and providing that if "the property" shall thereafter become mortgaged the policy shall be void, must be regarded as treating "the property" insured as a whole, since it does not provide a forfeiture for mortgaging "any of the property," and consequently mortgaging the personal property does not forfeit or avoid the policy. (*Born v. Home Ins. Co.*, 300.)

14. **INSURANCE—REVIVAL OF POLICY AFTER FORFEITURE.**—If a policy of insurance provides that it shall become forfeited if the property is thereafter mortgaged without the consent of the company, the fact that the property is so mortgaged does not avoid the policy, provided the mortgage is paid off and satisfied prior to the loss, as such payment operates to restore the property to the protection of the policy. (*Born v. Home Ins. Co.*, 300.)

15. **INSURANCE—FALSE REPRESENTATIONS—WAIVER.**—If a tenant by the entirety procures insurance on a building on the land, stating in his application that he holds the title by "deed," and receives a policy conditioned that it shall be void, "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured, in fee simple, he is entitled to recover if not guilty of willful misrepresentation, on the ground that such application is sufficient to put the insurer on inquiry as to the nature of the insured title, and that by issuing the policy without inquiry the conditions in the policy is waived. (*Clawson v. Citizens' etc. Ins. Co.*, 538.)

16. **INSURANCE—INSURABLE INTEREST.**—An estate by entirety is an insurable interest in the whole premises. (*Clawson v. Citizens' etc. Ins. Co.*, 538.)

17. **INSURANCE—SUBROGATION.**—Contracts of marine and fire insurance are essentially contracts of indemnity, and if the insured recovers the amount of his loss from any source, the insurer may recover from him pro tanto, and this right is called the subrogation of the insurer into the rights of the insured. (*Packham v. German Fire Ins. Co.*, 461.)

18. **INSURANCE—SUBROGATION—TORT OF THIRD PARTY—RELEASE BY INSURED.**—If a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety and the wrongdoer that of a

principal debtor. Hence, if the assured by his own act absolutely and without reservation releases the wrongdoer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation. (*Packham v. German Fire Ins. Co.*, 461.)

19. **INSURANCE—SUIT AGAINST WRONGDOER—RELEASE.** An insured has but one cause of action against a third party for the wrongful destruction of his property by fire, and when, in a suit to recover for the entire loss, the loss on a certain part of the property is excluded in the assessment of damages, his right of action therefor is effectually released. (*Packham v. German Fire Ins. Co.*, 461.)

20. **INSURANCE — SUBROGATION — DESTRUCTION OF RIGHT.**—The right of subrogation is derivative and comes from the insured, and can only be enforced in his right. Hence, where the loss under an insurance policy is caused solely by the wrongful act of a third party, a recovery by the insured against such third party for the entire loss destroys the insurer's right of subrogation. (*Packham v. German Fire Ins. Co.*, 461.)

21. **INSURANCE — SUBROGATION — DESTRUCTION OF RIGHT—ACTION AGAINST INSURER.**—Where an insured before suit brought by him against the insurer, or at the time of filing his plea therein, has by a release of all right of action against the wrongdoer, destroyed the insurer's right of subrogation, he has also destroyed his own right of action against the insurer. (*Packham v. German Fire Ins. Co.*, 461.)

22. **INSURANCE—SUBROGATION—PLEADING.**—In an action on an insurance policy, which provides for the assignment of the right of the insured upon payment of the loss by the insurer, while ordinarily the insurer must plead payment or a tender as a condition precedent to subrogation, yet this is not required where the insured has destroyed the insurer's right of subrogation by a release of all right of action against the wrongdoer, since in such case the insured possesses no right which he could assign. (*Packham v. German Fire Ins. Co.*, 461.)

23. **INSURANCE—SUBROGATION.—AN ADJUSTER** of an insurance company has no power to consent to the extinguishment of the insurer's right of subrogation. (*Packham v. German Fire Ins. Co.*, 461.)

24. **INSURANCE—WAIVER OF PROOF OF LOSS.**—A provision in a fire insurance policy that no officer or agent of the insurer shall have power to waive any condition therein unless such waiver is attached to the policy and approved by the secretary of the insurer, does not prohibit such secretary from otherwise waiving the furnishing of proofs of loss by the insured. (*Washburn-Halligan Co. v. Merchants' etc. Ins. Co.*, 311.)

25. **INSURANCE—WAIVER OF PROOF OF LOSS.**—If the secretary of the insurer writes to the insured informing him that as soon as his proof of loss is made out by another insurer, liable on a concurrent policy, he will make out proof of loss and send it to the insured to be signed, and subsequently requests a statement from the insured as to the items and values of loss as adjusted by such other insurer from which to make up proof of loss, and such statement is promptly furnished, subsequently to which he denies all liability for the loss, without withdrawing his offer to furnish proof of loss, he thereby, waives a condition in the policy requiring the insured to furnish proof of loss. (*Washburn-Halligan Co. v. Merchants' etc. Ins. Co.*, 311.)

26. INSURANCE.—CONCURRENT INSURANCE means any insurance running with that of the defendant insurer and sharing its risk, and includes policies covering, not only a part of defendant's risk, but all of it and more. "Other concurrent insurance permitted," in the absence of any limitation in amount, should not be construed to require the later policies to exactly concur in covering all of the insured property, nor in covering all the period of time of the insurance. (*Washburn-Halligan Co. v. Merchants' etc. Ins. Co.*, 311.)

27. REINSURANCE.—AN INSURED HAS SUCH AN INTEREST IN A CONTRACT OF REINSURANCE that he may sue the reinsurer to recover a loss on property covered by his policy, though he is not a party to the reinsurance contract and such contract expressly provides that no such action can be maintained. (*Shoaf v. Palatine Ins. Co.*, 804.)

See Interpleader.

INTERPLEADER.

JUDGMENTS IN REM—INSURANCE FUND—DECREE OF COURT IN ANOTHER STATE.—AN INTERPLEADER suit is not, in its nature, a proceeding in rem. Hence, where an insurance company files a bill of interpleader in one state alleging that a fund due under a policy is claimed by several parties, and pays the money into court, a decree of such court awarding the fund to another claimant is not binding on a nonresident administrator, who was not a party to the suit except by publication. (*Expressman's Mut. Ben. Assn. v. Hurlock*, 470.)

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE—PEDDLERS—LICENSE.—If goods have been shipped into the state unsold, taken from the carrier, the packages opened, and the goods carried about from place to place in the state and offered for sale, they have become thereby a portion of the mass of the general property of the state, have ceased to be under interstate commerce protection, and become subject to the laws of the state, and their sale may be regulated by the state the same as any other property. (*State v. Montgomery*, 386.)

2. INTERSTATE COMMERCE—PEDDLERS—LICENSE.—A statute by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents of the state and those of other states, is not, as to peddlers of goods previously sent them by manufacturers in other states, repugnant to the grant by the federal constitution to Congress of the power to regulate commerce among the several states. (*State v. Montgomery*, 386.)

IRRIGATION.

1. WATERS AND WATER RIGHTS—DITCHES—DUTY TO GUARD.—A ditch owner who acquires his right of way while the land is public must, nevertheless, provide reasonably adequate safeguards and barriers to prevent the livestock of an owner of land crossed by such ditch from falling into a dangerous washout, caused by the action of the water carried in such ditch. A failure to perform such duty renders the ditch owner liable in damages. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

2. WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER.—It is the duty of a ditch owner to protect his ditch so that it will not interfere with an owner whose land it crosses and the latter's enjoyment of his premises, to any greater extent than that reasonably justified by the easement, and it is not material that the washing done by such ditch is no greater than is done in other cases of water similarly conducted, nor that it may have been impracticable to build a flume, or that another or longer course would have been altogether too expensive and inconvenient. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

3. WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER TO GUARD.—A ditch owner has the right to adopt and employ a natural draw or gulch as a part of his ditch system, but if a dangerous washout or excavation results therefrom, the ditch owner must guard and protect it, and make reasonably adequate provision to prevent animals rightly upon the land from falling into it. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

4. WATERS AND WATER RIGHTS—DITCHES—DUTY OF OWNER TO SUBSEQUENT SETTLER.—The right of way accorded to a ditch owner over public lands must be held to be acquired with the knowledge and upon the understanding that the land itself remains open for settlement subject only to such right of way, and the reasonable enjoyment thereof, and the owner of such right of way must furnish and maintain reasonably adequate safeguards or protective appliances against injury to the subsequent settler upon the land. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

JOINT TORT FEASOR.

See Conversion.

JUDGMENT.

1. JUDGMENT—FINAL—FURTHER RELIEF.—A final judgment is conclusive both as to the relief granted and as to the relief denied or withheld, and upon its entry the jurisdiction of the court over the subject matter and the parties is exhausted; hence any further judgment or order materially varying the judgment is a nullity. (*White v. White*, 150.)

2. CONSTITUTIONAL LAW—FOREIGN JUDGMENTS.—Under the provision of the national constitution that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, a judgment of a court of another state is made, in an action thereon, a debt of record, not examinable upon its merits, but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can be executed in the latter only as its laws may permit. It is put upon the footing of a domestic judgment, by which is meant not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the case, or subject matter of the suit. (*Lamberton v. Grant*, 415.)

3. JUDGMENTS—RES JUDICATA—FAILURE TO SERVE PROCESS—NONAPPEARANCE.—Where a defendant is not served with legal notice, and is not present in person or by attorney, a judgment obtained against him is a nullity in another state. (*Arrington v. Arrington*, 791.)

4. JUDGMENTS—RES JUDICATA.—A judgment involving an interest in land is *res judicata* in an action involving title to personality, if the vital issue in both actions is the right to inherit as sole heir of a certain person, and the parties and the evidence required in each action are the same. (*Watson v. Richardson*, 331.)

5. JUDGMENTS—RES JUDICATA.—An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is announced, but in every other where the right or title is the same, although the cause of action may be different. (*Watson v. Richardson*, 331.)

6. JUDGMENTS—RES JUDICATA PENDING APPEAL.—A judgment or decree appealed from is *res judicata* until set aside, modified or reversed. (*Watson v. Richardson*, 331.)

7. JUDGMENT—FORMER SUIT AS A BAR.—An action in which a married woman is declared to be a *feme sole* is not a bar to a subsequent suit by the creditors of her husband, attacking the validity of the transfer from him to her of a check for pension money, made before she was declared a *feme sole*, although such creditors were parties defendant in the former suit. (*Falkenburg v. Johnson*, 369.)

8. JUDGMENTS—COLLATERAL ATTACK—ALTERATION. A decree for the sale of lands for taxes, fair upon its face, cannot be collaterally attacked by showing that, subsequently to its entry, a blank therein was filled, so as to show the amount decreed against the land. (*Haven v. Owen*, 477.)

9. JUDGMENTS — VACATING — UNAVOIDABLE CASUALTY.—A person who employs and pays counsel to make his defense has a right to rely upon his attorney to inform him as to the time of trial or of anything required of him for the purpose of defense, and the failure of such attorney to inform him of the time of trial, or to appear when the case is called for trial, is an "unavoidable casualty," which entitles him to a vacation of the judgment rendered by default, and to a new trial. (*Peterson v. Koch*, 261.)

10. JUDGMENTS—VACATING—FALSE TESTIMONY.—The intentional production by a litigant of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him. (*Barr v. Post*, 680.)

11. JUDGMENTS — VACATING — FALSE TESTIMONY. — In an action to cancel a judgment, on the ground that it was obtained by fraud, and by perjured evidence, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that the judgment rendered was not attributable to his negligence and inaction. He is not justified in assuming that his adversary cannot produce evidence in support of his contention, and he must be ready to meet the issue. (*Barr v. Post*, 680.)

See Costs; Eminent Domain, 3-5; Marriage and Divorce, 7; Homestead, 4; Interpleader.

JURISDICTION.

See Arrest, 1, 2; Executor and Administrator, 1-3.

JUROR

See New Trial, 2; Trial.

LABOR UNION.

1. LABOR UNIONS—TRADE LAW RULES—SUBJECTS OF. The law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork, and brain and muscle may be the subjects of trade law rules as well as tangible property. (*Hetterman v. Powers*, 348.)

2. LABOR UNIONS — DISTINGUISHING MARK OF SKILLED WORK—RIGHT TO USE.—Employés of a labor union, engaged in a skillful employment, such as the making of cigars, may so designate the result of their labor as to entitle them to the fruits of their skill when it is admittedly a source of pecuniary profit to them, although they may not own the property itself. (*Hetterman v. Powers*, 348.)

3. LABOR UNIONS — DISTINGUISHING MARK OF SKILLED WORK—PROPERTY RIGHT IN.—An employé of a labor union, whose skilled labor creates a demand for a commodity which secures for him higher remunerative wages, has a definite property right in the exclusive use of a particular label, sign, symbol, brand, or device adopted by him to distinguish and characterize his work as the product of skilled labor, and the courts will protect him against its unauthorized use. (*Hetterman v. Powers*, 348.)

4. LABOR UNIONS—LABEL DISTINGUISHING WORK AS SKILLED—LEGAL PROTECTION OF.—Members of a voluntary, unincorporated labor organization, such as a cigar makers' union, composed solely of practical cigar makers, are entitled to adopt a label as a distinguishing brand or mark of their work, and the courts will protect them against its unauthorized use, although they do not own the cigars to which their label is attached, and are not, in the ordinary sense, "in business" for themselves, but simply workmen. (*Hetterman v. Powers*, 348.)

5. LABOR UNIONS—LABEL DISTINGUISHING WORK AS SKILLED—VALIDITY OF.—A label adopted by a cigar makers' union certifying that the cigars to which it is affixed have been made by a first-class workman, a member of the union, "an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," does not attack any other manufacturer of cigars, and does not violate the rule that a lawful trademark must not transgress the rules of morality and public policy. (*Hetterman v. Powers*, 348.)

See Constitutional Law, 12-14.

LANDLORD AND TENANT.

NOTICE—POSSESSION OF TENANT AS NOTICE OF LANDLORD'S TITLE.—Possession by a tenant during the period for which the title to the property is held by a third person under a secret trust to reconvey, is such notice of the title of the landlord as prevents a judgment against such third person from attaching as a lien on the property against such landlord or his grantee. (*Beck Lumber Co. v. Rupp*, 190.)

See Assignment, 1, 2.

LARCENY.

LARCENY—MONEY PAID BY MISTAKE.—A person is guilty of larceny where he, upon presenting a check to a bank for

payment, receives, through the cashier's error, more money than the check calls for, and, with knowledge of the facts, refuses to return it upon demand. (*Bergeron v. Peyton*, 33.)

LEGITIMATED CHILD.

See Will, 13.

LIBEL.

1. **LIBEL—PRIVILEGED COMMUNICATION.**—A communication by an insurance company to its soliciting agent charging an examining physician with forgery in an application for insurance, and informing such agent that another examining physician would be appointed, is upon a subject relating to the agency involving a mutual interest, and is a privileged communication, and if made without malice is not actionable. (*Nichols v. Eaton*, 319.)

2. **LIBEL—PRIVILEGED COMMUNICATIONS—MALICE—BURDEN OF PROOF.**—If a communication alleged to be libelous is shown to be privileged, the burden of proof is cast upon the plaintiff to show malice in fact, and this, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to show fact and motive, is a question to be determined by the jury. (*Nichols v. Eaton*, 319.)

3. **LIBEL—PRIVILEGED COMMUNICATIONS—MALICE.**—If in actions for libel the occasion is privileged, and the publication is about a matter in which both parties have an interest, excess of privilege is material only as bearing upon the question of malice in fact, and the jury may find the existence of such malice from the language of the communication itself, or from extrinsic evidence. (*Nichols v. Eaton*, 319.)

4. **LIBEL—PRIVILEGED COMMUNICATIONS—MALICE—EXCESS OF PRIVILEGE.**—In an action for libel founded upon a privileged communication, the question whether there is such excess of privileged statement as to constitute malice in fact is for the jury to determine from the communication and the surrounding circumstances. (*Nichols v. Eaton*, 319.)

5. **LIBEL—REPETITION.**—If an article is libelous per se, the author cannot protect himself by showing that he has only repeated what he has heard, but he must also show the truth of the statement. (*Brewer v. Chase*, 527.)

6. **LIBEL—REPETITION.**—The rule that the whole of a libel must be justified to entitle the defendant to protection applies to repetitions of a libel heard from others, as well as to original articles. (*Brewer v. Chase*, 527.)

7. **LIBEL—INSTRUCTIONS.**—If the court has properly decided that an article published is libelous per se, it is error to instruct the jury in such manner as to permit it to determine that the article is not libelous. (*Brewer v. Chase*, 527.)

8. **LIBEL—EVIDENCE.**—A general inquiry regarding rumors, publications, and testimony upon other trials, and the opinions of witnesses as to the effect thereof, upon the character of the plaintiff in a suit for libel, is not admissible in evidence on the issue as to the truth of such libel. (*Brewer v. Chase*, 527.)

9. **LIBEL—PUBLICATION IN ANSWER TO—MALICE—PRIVILEGE.**—A publication which is fairly an answer to a libel, published in good faith for the purpose of repelling the charge, and not with malice, is privileged, though false. The court must de-

termine whether the occasion is one which justifies such publication, but the question of good faith is for the jury. (*Brewer v. Chase*, 527.)

10. **LIBEL—PUBLICATION IN ANSWER TO PRIVILEGE.**—A publication, made in answer to a libel, to be privileged, must be in the nature of an answer like an explanation or denial, and must have some connection with the charge sought to be repelled. (*Brewer v. Chase*, 527.)

11. **LIBEL—EVIDENCE OF PROVOCATION.**—In an action for libel based upon a published reply to a libelous article previously published, the latter is admissible in evidence as showing a provocation. (*Brewer v. Chase*, 527.)

12. **LIBEL—EVIDENCE—MITIGATION OF DAMAGES.**—The fact that defendant in an action for libel had heard the plaintiff charged with the offenses enumerated in the libelous article may be shown in mitigation of damages, but proof of rumors or statements of such nature heard by other than the defendant are not admissible in evidence. (*Brewer v. Chase*, 527.)

LICENSE.

1. **POLICE POWER—LICENSING VOCATION.**—If the state has power to license any business or vocation, it may exact a reasonable fee for carrying it on. (*State v. Snowman*, 380.)

2. **LICENSE OF OCCUPATIONS BY STATE.**—A statute providing for the examination of the followers of a particular occupation, and for the granting of certificates to follow such occupation, which shall be valid throughout the state, precludes a city from requiring the holders of such certificates to pay an additional license imposed by ordinance. Such certificate granted under the statute is a license itself. (*Wilkie v. Chicago*, 182.)

See *Constitutional Law*, 2-4; *Interstate Commerce*, 1, 2; *Municipal Corporation*, 3-5.

LIEN.

1. **LIENS—REPEALING ACT—IMPAIRING OBLIGATION OF CONTRACTS.**—A lien given by legislation may be taken away without in any wise interfering with or impairing the obligation of contracts. (*Wilson v. Simon*, 427.)

2. **LIENS—PLEADING.**—As against one who has given a lien upon property to secure a debt, due or to become due, it is not necessary in a suit to foreclose the lien to allege ownership in the property of the debtor. (*Ramsey v. Johnson*, 948.)

See *Attorney and Client*; *Mechanic's Lien*.

LIMITATION OF ACTIONS.

1. **STATUTE OF LIMITATIONS—SUBSEQUENT DISABILITY.**—Except as modified by positive enactment, no subsequent disability will suspend the operation of the statute of limitations after it has begun to run. (*Williams v. Long*, 68.)

2. **STATUTE OF LIMITATION—ANNUAL PAYMENT OF ALIMONY—WHEN BARRED.**—The statute of limitations does not run against a judgment debt before it is due; hence, under a ten year statute of limitations an action on a judgment decreeing the annual payment of alimony is barred only as to those payments which became due and collectible more than ten years before the institution of the action. (*Arrington v. Arrington*, 791.)

3. STATUTE OF LIMITATIONS—JUDGMENT IN ANOTHER STATE.—In an action on a judgment obtained in another state, the plea of the statute of limitations is a plea to the remedy, and the *lex fori* governs. (*Arrington v. Arrington*, 791.)

4. CONFLICT OF LAWS.—STATUTES OF LIMITATION are laws of process, and if they do not extinguish the right itself, are deemed to operate upon the remedy merely, and all questions arising under them must be determined by the law of the forum, and not by the law of the situs of the contract. (*Lamberton v. Grant*, 415.)

5. LIMITATIONS OF ACTIONS—CONFLICT OF LAWS.—If a statute of limitations of another state prescribes the effect of absence from the state with respect to the time when an action may be commenced, and pertains solely to the remedy, and neither interprets, qualifies, nor extinguishes the right, it does not constitute a part of a judgment of a court of that state nor follow it beyond the limits thereof, and it cannot be asserted in support of an action in another state. (*Lamberton v. Grant*, 415.)

6. LIMITATION OF ACTIONS—CONFLICT OF LAWS.—If the statute of limitations of a state not only destroys the right of action but also the cause of action, it may be successfully invoked as a bar to the action in whatever state the action may be brought. (*Lamberton v. Grant*, 415.)

7. LIMITATION OF ACTIONS—CONFLICT OF LAWS.—The plea of the statute of limitations to an action instituted in one state on a judgment obtained in another is a plea to the remedy, and the *lex fori* controls. (*Lamberton v. Grant*, 415.)

See Adverse Possession; Appeal, 1, 2; Banks and Banking, 8; Executor and Administrator, 11.

LIS PENDENS.

LIS PENDENS—PENDENCY OF APPEAL.—If, in an action to quiet title, being one of a large number of suits brought by the same plaintiff in the same county, all involving a federal question, a decree is rendered against all of the defendants in that and the other suits, after which an appeal is taken in each case under stipulation between all of the parties that appeals in two cases should be finally prosecuted, while the remaining appeals should stand continued until final decision, and after decision by the state supreme court the appeals are prosecuted by writ of error in a federal court, where a final decision is rendered, which is followed by the state supreme court, reversing the decree of the state district court, the action against all of the defendants must be regarded as pending from the time of the filing of the petition in the district court until the last decision by the state supreme court, and a purchaser from the plaintiff pending the appeals in such actions acquires no interest in the property as against defendants, under a statute providing that when a petition is filed affecting real estate the action is pending so as to charge third persons with notice, and that while so pending no interest in the property can be acquired by third persons. (*Olson v. Lebpke*, 327.)

LIVERYMEN'S ASSOCIATION.

See Monopoly.

LOBBYING.

See Contracts, 3.

MANDAMUS.

MANDAMUS WILL NOT LIE TO COMPEL A SHERIFF to sell land liable to execution. (Wright v. Bond, 781.)

MARRIAGE AND DIVORCE.

1. **A MARRIAGE IS VOID** where either party to it has a living, undivorced husband or wife. (Barth v. Barth, 335.)

2. **EQUITY—JURISDICTION—MARRIAGES.**—Courts of general equity jurisdiction have express statutory authority, in the state of Kentucky, to declare void a marriage obtained by force or fraud. (Barth v. Barth, 335.)

3. **MARRIAGE—ACTION FOR DIVORCE—FRAUD—ANNULMENT OF MARRIAGE.**—Pending an action for a divorce brought by a husband against his alleged wife, the plaintiff should be permitted to file an amended petition, alleging that, at the time of the marriage between the plaintiff and the defendant, the latter represented herself to be an unmarried woman, when in fact she then had a living, undivorced husband; and such petition may properly contain a prayer that the marriage be declared void ab initio. (Barth v. Barth, 335.)

4. **ABATEMENT—REVIVOR OF SUIT TO ANNUL MARRIAGE.**—A man who is a party to a void marriage has a right to petition a court to have his marriage declared null and void and to relieve his estate from any further claim of his alleged wife, and this right survives to his administrator, who is entitled to have the decedent's property rights determined. (Barth v. Barth, 335.)

5. **REVIVOR OF SUIT TO ANNUL MARRIAGE—INJUNCTION.**—If a plaintiff in an action for divorce dies, after having filed an amended petition to annul the marriage, and his administrator and heirs file an amended petition of revivor, in which they seek to have the action prosecuted in the name of the administrator, but a demurrer thereto is sustained, the plaintiffs should be permitted to file a second amended and supplemental petition for the annulment of the marriage, alleging that the defendant is asserting certain property rights in the estate of the decedent, as his widow, and asking that she be enjoined from setting up or making any claim whatever to such estate. (Barth v. Barth, 335.)

6. **MARRIAGE—ACTION FOR DIVORCE—COSTS—ATTORNEY'S FEE.**—In a suit for divorce, brought by a husband, the wife is in fault and not entitled to an attorney's fee or any other costs where she had a husband living at the time of the alleged marriage with the plaintiff. (Barth v. Barth, 335.)

7. **DIVORCE—JUDGMENT IN ANOTHER STATE—RES JUDICATA.**—UNDER THE UNITED STATES CONSTITUTION, article 4, section 1, requiring full faith and credit to be given in each state to the judicial proceedings of every other state, a decree for divorce made in one state by a court having jurisdiction of the subject matter and the parties is res judicata, and binding on them in an action on the judgment in another state. (Arrington v. Arrington, 791.)

MASTER AND SERVANT.

1. **MASTER AND SERVANT—DEFECTIVE APPLIANCES.**—To be relieved from liability for injuries received by a servant from the use of defective materials, the master is not required to supply the best materials known, or to subject such as he does supply to

an analysis to determine what hazard may be incurred in their use. (Purdy v. Westinghouse Electric etc. Co., 816.)

2. MASTER AND SERVANT—DEFECTIVE APPLIANCES.—Absolute safety is unattainable and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business as conducted by prudent men. (Purdy v. Westinghouse Electric etc. Co., 816.)

3. MASTER AND SERVANT—DEFECTIVE APPLIANCES.—A workman cannot recover damages for an injury caused by the explosion of a barrel containing castings, but which had originally contained some explosive material, if it appears that the explosion was caused by another workman striking a match, that the master had no knowledge that such barrel was explosive, or that it was, in any way, unsuitable to the use to which it was then put, and that it was the kind of barrel commonly and ordinarily used for such purpose. (Purdy v. Westinghouse Electric etc. Co., 816.)

4. MASTER AND SERVANT—RISKS OF EMPLOYMENT.—INFANTS, like adults, assume the ordinary risks of the service in which they engage. (Omaha Bottling Co. v. Theiler, 673.)

5. MASTER AND SERVANT.—INFANT EMPLOYEES are entitled to warnings of dangers which, on account of their youth and inexperience, they do not fully comprehend, and if such warning is not given, or if it be inadequate, the master is in fault, and must answer for the consequences. (Omaha Bottling Co. v. Theiler, 673.)

6. MASTER AND SERVANT—MACHINERY AND APPLIANCES.—The measure of a master's duty to his servants is the care required by the usual and ordinary usage of the business, and he is not negligent in the conduct thereof if he uses such machinery and appliances as are in common and general use. Hence, if a servant, aware of the risks and dangers incident to the business thus conducted, sustains an injury, he is not entitled to recover, unless the master is otherwise negligent. (Omaha Bottling Co. v. Theiler, 673.)

7. MASTER AND SERVANT—RISKS OF EMPLOYMENT—DUTY TO WARN OF.—If a servant, whether adult or minor, from the length and character of previous service and experience, may be presumed to know the ordinary risks attending the proper conduct of the business in which he is employed, he is not entitled, as an absolute right, to notice and warnings of the ordinary hazards and latent dangers attending the business. The master is required, under such circumstances, to do only what a prudent master would naturally do. (Omaha Bottling Co. v. Theiler, 673.)

8. MASTER AND SERVANT—TORTIOUS ACT OF SERVANT—MASTER'S LIABILITY.—The tortious act of a servant, within the scope of his duty, is the act of the master himself. (Bergman v. Hendrickson, 47.)

9. MASTER AND SERVANT—SCOPE OF SERVANT'S DUTY—QUESTION FOR JURY.—If a bartender has trouble with an intoxicated customer, who refuses to pay for his drinks, and assaults him, the question as to whether the barkeeper was acting within the scope of his duty should be left to the jury, where the testimony is open to two inferences, one that the assault was entirely personal, on account of the customer's threatening motions toward the barkeeper and a vile epithet applied to the latter, and the other that the assault was committed for the purpose of enforcing payment for the liquor. (Bergman v. Hendrickson, 47.)

10. MASTER AND SERVANT—ASSAULT BY BARTENDER—SCOPE OF EMPLOYMENT—MASTER'S LIABILITY.—If an intoxicated customer at the bar of a saloon refuses to pay for his drinks, and the bartender assaults him for the purpose of collecting pay for the liquor, he acts within the scope of his employment, and his master is answerable, although the servant may have been expressly prohibited from performing his duty in such a manner, and the assault was provoked by the customer's misbehavior and insulting language. (*Bergman v. Hendrickson*, 47.)

MECHANIC'S LIEN.

1. MECHANICS' LIENS—DESCRIPTION OF PREMISES.—A mechanic's lien attaches to a building erected under a contract describing the premises merely as ground situated in a certain place, when it is erected upon the only land owned by the party in the place named. (*Jossman v. Rice*, 493.)

2. MECHANICS' LIENS—HOMESTEAD.—Under a constitutional provision making a wife's signature necessary to a valid alienation of a homestead, her homestead interest in land owned by herself and husband jointly cannot be divested by a mechanic's lien acquired under a contract signed by the husband alone, although it was entered into with her knowledge and consent, and a statute provides that if improvements are made under such circumstances, the lien shall attach as though the contract were signed by the wife. (*Jossman v. Rice*, 493.)

3. MECHANICS' LIENS — HOMESTEAD — REMOVAL AND SALE OF BUILDING.—Under a statute providing that a mechanic's lien shall attach to a building for which labor and material is furnished, in preference to any prior title to the land on which it is built, and that when it is an original and independent building, commenced since the attaching of the prior title, its separate sale and removal may be ordered by the court; the court has power to permit the materialman to sell and remove such building, when no lien can attach because of the homestead interest of the wife, who has not signed the contract for the erection of such building. (*Jossman v. Rice*, 493.)

4. MECHANIC'S LIEN—NOTICE OF CLAIM—FAILURE TO STATE NAME OF TRUE OWNER.—Under a statute requiring a notice of claim of a mechanic's lien to contain the name of the owner, lessee, general assignee, or person in possession of the premises, against whose interest a lien is claimed, but providing that the failure to state such name shall not impair the validity of the lien, the word "failure" evidently means an unsuccessful attempt to name or designate such person. It does not mean that the lienor may name the lessee as the true person against whose interest he claims a lien, and then afterward proceed against the lessor, against whose interest he did not intend to file notice of a claim. (*De Klyn v. Gould*, 719.)

5. MECHANIC'S LIEN — INCREASED IMPROVEMENTS — CONSENT OF OWNER WILL NOT BE IMPLIED, WHEN.—If a tenant of real property binds himself, by the terms of his lease, to make certain alterations and improvements thereon, at his own expense, but makes an important and expensive departure from the specifications, involving an extravagant outlay of money, far beyond the amount originally contemplated, the owner is not answerable for the extra work done or the materials furnished therefor, on the ground of consent, where he has not said or done anything to mislead the lessee or the contractor. The owner's consent will

not be implied from a mere acquiescence in the alterations and improvements. (*De Klyn v. Gould*, 719.)

6. **MECHANIC'S LIEN — BOND TO DISCHARGE.** — THE SURETIES upon a bond given to discharge a mechanic's lien may defend an action against themselves and their principals to foreclose it, though the judgment demanded is in form against the property represented by the bond, and may show therein that the amount of the claim in the notice of lien is exaggerated and false, and that the plaintiffs are not entitled to a judgment for the amount claimed, although their principals do not see fit to defend. (*Aeschlimann v. Presbyterian Hospital*, 723.)

7. **MECHANIC'S LIEN—FORFEITURE OF BY FABRICATED DEMAND.**—The insertion of an exaggerated and willfully false and fabricated demand in the notice of a mechanic's lien forfeits the right of the claimant to enforce it upon property against which it is filed. Hence, the plaintiffs in an action which is in form one to foreclose a mechanic's lien, but which is in fact an action upon a bond given to procure a discharge of the plaintiff's lien, cannot recover against the sureties upon the bond where the plaintiffs inserted in their notice of lien statements of their claim which were intentionally exaggerated and fictitious, and made for the purpose of enforcing a false and fabricated demand. (*Aeschlimann v. Presbyterian Hospital*, 723.)

8. **MECHANIC'S LIEN—MORTGAGE — PRIORITIES.** — The rights of the holder of a mechanic's lien are inferior to the rights of a purchaser under a mortgage, where the materials were not furnished until after the registration of the mortgage, and without notice to the mortgagee, though the contract to furnish the materials antedated the mortgage. (*New Memphis Gaslight Company Cases*, 880.)

9. **MECHANIC'S LIEN — REPEALING ACT — IMPAIRING CONTRACT OBLIGATION—CONSTITUTIONAL LAW.**—Where the right to a mechanic's lien springs neither from contract nor from the principles and practices of the common law, but is the creature of positive statutory enactment, such right is not a vested right, but an extraordinary remedy only, which the state may discontinue at pleasure. Hence a repealing statute is not unconstitutional as impairing the obligation of a contract, though it deprives a party of the lien theretofore given him. (*Wilson v. Simon*, 427.)

10. **STATUTE—REPEAL OF—EFFECT ON EXISTING LIENS.** Where an act, which repeals a mechanic's lien law, has no saving clauses in favor of liens then existing, all such liens are obliterated from the laws of the state as completely as if they had never existed, except for the purpose of suits which were commenced, prosecuted, and concluded while it was existing law. (*Wilson v. Simon*, 427.)

MISCONDUCT OF ATTORNEY.

See Appeal, 9.

MONOPOLY.

1. **UNLAWFUL COMBINATIONS—LIVERYMEN'S ASSOCIATION—STIFLING COMPETITION IN BUSINESS.**—A combination of liverymen to limit their services to persons patronizing them exclusively and to monopolize the livery business in a particular city, including such service for the burial of the dead, and to carry prices to, and maintain them at, such a level as the combination

may see fit to adopt, and to so stifle competition and hamper individual, independent industry in regard to such business as to paralyze individual effort and compel every person, in order to obtain proper facilities for a funeral, to submit to the dictates of the combine, is clearly unlawful as against public policy. (*Gatzow v. Buening*, 17.)

2. PUBLIC COMBINATIONS.—IF AN UNLAWFUL COMBINATION EXISTS, IT IS NONE THE LESS UNLAWFUL because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. (*Gatzow v. Buening*, 17.)

3. UNLAWFUL COMBINATIONS—LIVERYMEN'S ASSOCIATION—ACTION FOR DAMAGES—DEFENSE.—In a proceeding for damages for wrongdoing by an unlawful combination of liverymen to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy. (*Gatzow v. Buening*, 17.)

4. UNLAWFUL COMBINATIONS AND UNLAWFUL ACTS DONE PURSUANT THERETO—LIVERYMEN'S ASSOCIATION.—If a member of a liverymen's association lets a hearse and carriage to a customer to be used at the funeral of the latter's child, but, upon learning that the person in charge is an undertaker and liveryman doing an independent business, joins with the secretary of the association, in accordance with its rules, in sending the vehicles away from the customer's house just as they are about to be used and when another hearse cannot be supplied, and for the purpose of demonstrating the power of the association to punish independent liverymen and persons dealing with them, such acts are unlawful, and the wrongdoers are answerable for both actual and exemplary damages. (*Gatzow v. Buening*, 17.)

5. UNLAWFUL COMBINATIONS—UNLAWFUL ACTS—RESTRAINT OF TRADE.—While a combination of persons, to restrict legitimate trade or commerce in any field, may not interfere with trade or individual freedom, yet overt, unlawful acts by two or more of its members, acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. (*Gatzow v. Buening*, 17.)

MORTGAGE.

See Agency, 1; Chattel Mortgage; Corporations, 7, 8, 24; Homestead, 2, 3; Mechanic's Lien, 8; Trust, 8.

MOTION.

See Trial, 8.

MUNICIPAL CORPORATION.

1. MUNICIPAL CORPORATIONS CANNOT HOLD LAND IN TRUST FOR RELIGIOUS PURPOSES. Hence, there can be no dedication to a municipal corporation, as trustee, for such purposes. (*Maysville v. Wood*, 355.)

2. MUNICIPAL CORPORATIONS—ILLEGAL ORDINANCE—SUIT TO ENJOIN ENFORCEMENT OF.—To prevent a multiplicity of suits, persons who follow one certain occupation and whose rights and liabilities are identical, may join in one suit to restrain the enforcement of an alleged illegal ordinance requiring them to obtain a license, when each is threatened with a prosecution for non-compliance with such ordinance. (*Wilkie v. Chicago*, 182.)

3. MUNICIPAL CORPORATIONS—POWER TO LICENSE OCCUPATIONS.—A city has no inherent power to license any occupation, or to exact a license fee from any person, and the power so to do must be found in its charter, and must be either expressly given, or be a necessary incident to the carrying out of the power granted. (*Wilkie v. Chicago*, 182.)

4. MUNICIPAL CORPORATIONS—POWER TO LICENSE—EXERCISE OF POLICE POWER.—To justify an ordinance licensing a particular occupation as a proper exercise of the police power, it must appear that the requirement of such license tends to promote the public health, morals, safety, comfort, or welfare, or to suppress disease. (*Wilkie v. Chicago*, 182.)

5. MUNICIPAL CORPORATIONS.—THE POWER TO LICENSE OCCUPATIONS resides in the legislature primarily, and it may grant the license directly, or confer such right upon municipal corporations. Having thus delegated its power, the legislature may, at any time take it back and resume the exercise of the power itself. (*Wilkie v. Chicago*, 182.)

6. MUNICIPAL CORPORATIONS—INDEBTEDNESS.—Municipal contracts, in so far as they affect the limitation of indebtedness, must be tested as of the time when made. (*Addyston Pipe etc. Co. v. Corry*, 812.)

7. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATION UPON.—If a city has money on hand, or provides at the time a present means of raising it otherwise than by loan, it may contract for expenditures without restriction, as there is no constitutional limitation on municipal expenditure, provided the city pays as it goes. What is prohibited is the incurring of debt. (*Addyston Pipe etc. Co. v. Corry*, 812.)

8. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMITATIONS UPON.—If a contract made by a city pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of a constitutional provision limiting the power of municipalities to contract debts. (*Addyston Pipe etc. Co. v. Corry*, 812.)

9. MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund to pay, a contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. (*Addyston Pipe etc. Co. v. Corry*, 812.)

10. MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONTRACTS.—If a city, at the time of making a contract, levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood, or decline in values, the result is an insufficient fund, it cannot be held that the contract, good at its inception, is thereby rendered void, as in violation of a constitutional

restriction on municipal indebtedness. (*Addyston Pipe etc. Co. v. Corry*, 812.)

11. MUNICIPAL CORPORATIONS—INDEBTEDNESS—CONTRACTS.—If a city provides that the contract price of an improvement shall be paid partly by money on hand and partly by assessments on abutting and nonabutting property, and the latter proves not liable to such assessment, the loss must fall upon the city, although the contract, as made, increased the city debt beyond the constitutional limitation (*Addyston Pipe etc. Co. v. Corry*, 812.)

12. CONSTITUTIONAL LAW—LIMITATION ON MUNICIPAL INDEBTEDNESS.—Under a constitutional provision prohibiting a city from incurring an aggregate indebtedness exceeding five per cent on the value of the taxable property within the city, to be ascertained by the last state and county tax list, the indebtedness of the city is not limited to five per cent of its property subject to taxation for city purposes, if the state and county tax lists include all property in the corporate limits, whether taxable for city purposes or not. (*Windsor v. Des Moines*, 280.)

13. CONSTITUTIONAL LAW—LIMITATION ON MUNICIPAL INDEBTEDNESS—DEBT, WHAT IS.—If it is optional with a city whether it shall pay anything further on a contract, such contract does not create a debt to be considered in ascertaining whether the city has exceeded its constitutional limit of indebtedness. (*Windsor v. Des Moines*, 280.)

14. CONSTITUTIONAL LAW—MUNICIPAL INDEBTEDNESS. BURDEN OF PROOF is upon a city to show that certain contract liabilities are to be paid out of its current revenues, when it is claimed that such liabilities exceed the constitutional limit of such city's indebtedness. (*Windsor v. Des Moines*, 280.)

15. CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS.—A constitutional provision limiting the indebtedness of a city in any manner to a certain amount prohibits such indebtedness in the form of a bond, note, or any other kind of obligation, whether in writing or by parol, express, or implied. (*Windsor v. Des Moines*, 280.)

16. CONSTITUTIONAL LAW—LIMIT ON MUNICIPAL INDEBTEDNESS.—If a city agrees to issue warrants and levy a tax to pay a contract entered into by it, and also pledges its future revenues therefor, it creates an indebtedness within the meaning of a constitutional provision prohibiting it from incurring an indebtedness beyond a certain amount. In such case the city cannot anticipate its future revenues to be created by general taxation. (*Windsor v. Des Moines*, 280.)

17. CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS—NECESSITY AS DEFENSE.—The necessity of a city for an electric light plant is no defense for the construction thereof by the city, if such act increases its indebtedness beyond the limit fixed by a constitutional provision. (*Windsor v. Des Moines*, 280.)

18. CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL INDEBTEDNESS.—The right of a city to levy a special assessment to maintain and operate an electric plant does not authorize it to anticipate its future general revenues in excess of the constitutional limit for the purpose of erecting such plant. (*Windsor v. Des Moines*, 280.)

19. CONSTITUTIONAL LAW—LIMIT ON MUNICIPAL INDEBTEDNESS—FUTURE PAYMENTS UNDER CONTRACTS.—If

the time of payment for a contract entered into by a city for the erection of a public improvement is postponed to a future date, and no special levy of taxation for the purpose of erecting such improvement is authorized, the sums to become due under such contract must be taken into account in estimating the amount of the existing municipal indebtedness, in ascertaining whether it exceeds the constitutional limit. (*Windsor v. Des Moines*, 280.)

20. **CONSTITUTIONAL LAW—LIMIT OF MUNICIPAL TAXATION.**—The fact that a city does not, by entering into a contract for the construction of an electric light plant, obligate itself to pay more therefor than it has theretofore paid for lighting alone, is no defense for exceeding its constitutional limit of taxation by entering into such contract. (*Windsor v. Des Moines*, 280.)

21. **MUNICIPAL CORPORATIONS—USE OF STREETS—POWER OF COURT.**—A court cannot prescribe reasonable rules and regulations for the use of the streets of a city, but it may require the city authorities to adopt such regulations, and may then pass upon their validity. (*Michigan Tel. Co. v. St. Joseph*, 520.)

22. **STREET ASSESSMENTS—BOND GUARANTEEING WORK FOR ONE YEAR.**—A MUNICIPAL ORDINANCE requiring a contractor for street improvements to file a bond guaranteeing the work for one year from injury by ordinary use is unauthorized, increases the burdens of the property owner, and renders the contract and assessment void. (*Alameda Macadamizing Co. v. Pringle*, 124.)

23. **STREET IMPROVEMENTS—DUTY OF OFFICERS—BONDS.**—Municipal officers are charged with the duty of seeing that street improvement work is properly done, and a bond given by the contractor cannot be substituted for the performance of this duty. (*Alameda Macadamizing Co. v. Pringle*, 124.)

24. **MUNICIPAL CORPORATIONS—LIABILITY TO PROPERTY OWNERS FOR GRADING OF STREETS BY THIRD PERSONS.**—A municipal corporation cannot divest itself of its duty to superintend and control all improvements made by its agents, servants, and contractors; hence, a municipality which permits a third person to grade its streets, and receives and uses such work after it is done, is liable for any damage caused to abutting property owners by reason of a change of grade, whether such grading was legally authorized or merely permitted to be done. (*Knoxville v. Harth*, 901.)

25. **MUNICIPAL CORPORATIONS—LIABILITY FOR GRADING STREETS.**—Under a constitutional provision which prohibits private property from being taken or injured for public use without just compensation being made therefor, a municipal corporation is liable for damage caused to the owner of an abutting lot by excavating a street in front thereof. (*Eachus v. Los Angeles*, 147.)

26. **TRIAL—STRIKING OUT EVIDENCE—DAMAGES—ISSUES UNDER PLEADINGS.**—In a suit to recover damages caused by street grading, where the complaint alleges that the grading cut off access to the plaintiff's property and utterly destroyed the value thereof, a motion to strike out all the evidence tending to prove damages from any other cause than by cutting off access to the property is properly denied, where the answer denies that any damage was done to the property, and any uncertainty in the complaint was waived by failure to interpose a special demurrer. (*Eachus v. Los Angeles*, 147.)

See Evidence, 12, 13; Corporations, 7, 8.

MUNICIPAL ORDINANCE.

See Evidence, 12, 13; Railroad, 3-5.

NAVIGABLE STREAM.

See Waters and Watercourses, 1-5.

NEGLIGENCE.

1. **NEGLIGENCE—PROXIMATE CAUSE.**—It is the duty of a ditch owner to properly guard a dangerous excavation caused by the wash of his ditch so as to prevent animals rightly upon the land from falling therein, and the fact that animals injured by falling into such excavation are driven toward the ditch by a snow-storm does not relieve him from liability, as his negligence, and not the storm is the proximate cause of the injury. (*Big Goose etc. Ditch Co. v. Morrow*, 955.)

2. **ACT OF GOD—FIRE OF INCENDIARY ORIGIN.**—Wheat destroyed by fire of incendiary origin is not destroyed by the act of God. (*Pope v. Farmers' Union etc. Co.*, 87.)

See Bailment; Railroad, 1; Telegraph Company; Warehouseman.

NEGOTIABLE INSTRUMENT.

1. **NEGOTIABLE INSTRUMENTS ARE SUCH AS RUN TO ORDER OF BEARER**, payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency. (*Hatch v. First Nat. Bank*, 401.)

2. **NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT** payable in current funds to the order of the depositor on return of the certificate properly indorsed, with interest at three per cent per annum, if on deposit six months, are negotiable instruments. (*Hatch v. First Nat. Bank*, 401.)

3. **NEGOTIABLE INSTRUMENTS.—CERTIFICATE OF DEPOSIT—"CURRENT FUNDS."**—The term "current funds," when used in commercial transactions as the expression of the medium of payment, must be construed to mean current money, and a certificate of deposit payable in current funds is, in this respect, negotiable. (*Hatch v. First Nat. Bank*, 401.)

4. **NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT** made "payable on their return properly indorsed" create no such contingency as to payment as renders them non-negotiable. (*Hatch v. First Nat. Bank*, 401.)

5. **NEGOTIABLE INSTRUMENTS.—CERTIFICATES OF DEPOSIT** payable on demand "with interest at three per cent per annum, if on deposit six months," are not rendered non-negotiable by such interest clause. (*Hatch v. First Nat. Bank*, 401.)

6. **NEGOTIABLE INSTRUMENTS.—GAMBLING CONTRACT.**—Under a statute providing that all contracts or notes, the consideration whereof shall be money or any other valuable thing, won by gaming, shall be utterly void and of no effect, a note given in settlement for money lost by the maker in a gambling game is void, no matter in whose hands it may be, nor does the subsequent verbal promise of the maker of the note to pay the holder thereof render him liable thereon. (*Swinney v. Edwards*, 916.)

See Banks and Banking, 4-9; Receiver, 2-5.

NEW TRIAL

1. NEW TRIAL—CRIMINAL CASE—NEWLY DISCOVERED EVIDENCE.—Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court, and the presumption is that such discretion was properly exercised. (*People v. Rushing*, 141.)

2. NEW TRIAL—DEPUTY SHERIFFS AS JURORS—CRIMINAL CASE.—A defendant in a criminal case is entitled to a new trial, where two of the jurors called as talesmen were deputy sheriffs, which fact was not known to the defendant or his attorneys until after the return of the verdict. (*Gaff v. State*, 235.)

NOTICE.

See Landlord and Tenant.

OFFICERS.

1. PUBLIC OFFICERS — SURETIES — EVIDENCE OF INDEBTEDNESS.—Books of account kept, and reports and statements made, by a public officer in his official capacity concerning the receipts and expenditures of his office are admissible as evidence of his indebtedness against him and his sureties. (*Independent School Dist. v. Hubbard*, 271.)

2. PUBLIC OFFICERS—SETTLEMENT—CONCLUSIVENESS. If a re-elected public officer makes an official settlement of his accounts, and produces the funds in his control before his bond is approved, as required by statute, such settlement is conclusive, in the absence of fraud or mistake, and no inquiry can be made as to the source of the necessary funds. (*Independent School Dist. v. Hubbard*, 271.)

3. PUBLIC OFFICERS — SETTLEMENT — SURETIES FOR SECOND TERM—ESTOPPEL.—If funds in the control of a re-elected public officer are not actually produced on his settlement for his first term before the approval of his bond, as required by statute, his sureties are not estopped from showing that a defalcation, for which they are sought to be charged, in fact occurred prior to the making and approval of their bond. (*Independent School Dist. v. Hubbard*, 271.)

4. PUBLIC OFFICERS — SETTLEMENT — SURETIES FOR SECOND TERM—BURDEN OF PROOF.—If a re-elected public officer has made an official settlement for his first term before the approval of his official bond for his second term, as required by statute, the burden of proof is on his sureties to show a failure to produce all of the funds in his control on such settlement, and their misappropriation prior to the taking effect of their bond. (*Independent School Dist. v. Hubbard*, 271.)

5. PUBLIC OFFICERS—SURETIES—DUTY OF OBLIGEE.—The obligee in an official bond is not bound voluntarily to warn the surety of the known dishonesty of his principal. (*Independent School Dist. v. Hubbard*, 271.)

6. PUBLIC OFFICERS — SETTLEMENT — SURETIES FOR SECOND TERM.—Certificates of deposit issued by a solvent bank to a re-elected public officer, and treated as cash at his settlement for his first term, must be treated as cash in a suit on his bond for his second term approved after such settlement. (*Independent School Dist. v. Hubbard*, 271.)

7. PUBLIC OFFICERS—SETTLEMENT—CONVERSION—SURETIES FOR SECOND TERM.—The fact that money represented by certificates of deposit produced by a re-elected public officer, and treated as cash in his settlement for his first term, is temporarily borrowed on his private note, does not affect the title to the fund, and if he afterward uses the money to pay such note this amounts to a conversion, for which the sureties on his bond for his second term, approved after such settlement, are liable. (*Independent School Dist. v. Hubbard*, 271.)

8. PUBLIC OFFICERS—SETTLEMENT—SURETIES FOR SECOND TERM.—If certificates of deposit issued by an insolvent bank to a re-elected county officer are treated as cash in his settlement for his first term, and before the approval of his bond for his second term, the sureties on his bond for such second term are not liable for the loss occasioned thereby. (*Independent School Dist. v. Hubbard*, 271.)

9. PUBLIC OFFICERS—SETTLEMENT—EVIDENCE—SURETIES FOR SECOND TERM.—Statements made by a re-elected public officer during his settlement of accounts for his first term are admissible in evidence in an action on his official bond for his second term. (*Independent School Dist. v. Hubbard*, 271.)

10. PUBLIC OFFICERS—SURETIES FOR SECOND TERM.—Sureties on the bond of a re-elected public officer cannot avoid liability on account of false statements as to such officers' accounts made before their bond was executed, without authority, and having no connection with such officer's official duties. (*Independent School Dist. v. Hubbard*, 271.)

11. PUBLIC OFFICERS—SURETIES FOR SECOND TERM.—Good faith or diligence in the obligee in an official bond in treating evidence of debt as money in making a settlement with a re-elected officer for his first term cannot be considered in deciding the question as to when he embezzled public money, in an action against the sureties on his bond for his second term. (*Independent School Dist. v. Hubbard*, 271.)

12. OFFICIAL BONDS—OFFICIAL RECORDS AS EVIDENCE AGAINST SURETIES.—The records of a public officer kept by the incumbent of such office are competent evidence against his sureties, and, in the absence of countervailing proof, are conclusive. (*Paxton v. State*, 689.)

13. OFFICIAL BONDS—ACCOUNTING—LIABILITY OF SURETIES.—An officer who, in accounting to himself as his own successor, turns over bank credits, afterward entered as cash receipts on the books of his office, prima facie relieves the bondsmen for his first term from liability, and charges his bondsmen for his second term, with the amount of such credits. (*Paxton v. State*, 689.)

14. OFFICIAL BONDS—LIABILITY OF SURETIES—STATEMENT BY ACCOUNTING OFFICER AS EVIDENCE.—A document containing an accounting made by an officer and used by him in turning over his office to his successor as required by law is competent evidence against the sureties on the official bond of the former officer. (*Paxton v. State*, 689.)

15. OFFICIAL BONDS ARE WITHOUT VALIDITY until delivered. (*Paxton v. State*, 689.)

16. OFFICIAL BONDS—ACCEPTANCE BY GOVERNOR.—The governor of the state has no authority, as its agent, to accept the official bonds of state or district officers, and thereby give them va-

lidity as a contract. His sole duty is to approve them. (Paxton v. State, 689.)

17. OFFICIAL BONDS—NECESSITY OF FILING.—The official bonds of state and district officers do not become binding obligations until they have been filed in the office of the secretary of state. (Paxton v. State, 689.)

18. INSTRUMENTS ARE NOT DELIVERED until they have passed beyond the dominion, control, and authority of the makers, and are no longer capable of being recalled. Such delivery is essential to the validity of an official bond, and until so delivered it is not a binding contract. (Paxton v. State, 689.)

19. OFFICIAL BONDS.—MERE APPROVAL of official bonds does not work their acceptance, nor make them valid contracts. (Paxton v. State, 689.)

20. OFFICIAL BONDS—AGENCY TO DELIVER.—The principal in an official bond has an implied agency to deliver it as the contract of his sureties. (Paxton v. State, 689.)

21. OFFICIAL BONDS.—POSSESSION BY THE PRINCIPAL of an official bond on a day subsequent to that fixed by statute for its delivery carries with it prima facie the right to have it approved and delivered. (Paxton v. State, 689.)

22. OFFICIAL BONDS—RIGHT OF SURETY TO REVOKE.—Sureties on an official bond have the right to revoke their principal's authority to bind them at any time before the bond is delivered, but without such revocation the right of the principal to deliver the bond and bind them continues. Until the sureties are accepted they are at liberty to recede, but until they have signified an intention to do so, the state may bind them by accepting their bond. (Paxton v. State, 689.)

23. OFFICIAL BONDS—ADDITIONAL SURETIES.—No state officer has authority to demand additional sureties of another state officer after his official bond has been duly approved and filed of record, and sureties signing under such circumstances are not bound. (Paxton v. State, 689.)

24. OFFICIAL BONDS—FAILURE TO FILE IN TIME.—The failure of an officer to have his official bond approved and filed within the time fixed by statute creates a vacancy in the office to which he has been elected or appointed; but in such case the state may waive its right to oust the incumbent and elect to deal with him as entitled to the office. (Paxton v. State, 689.)

25. OFFICIAL BONDS—FAILURE TO FILE IN TIME—WAIVER OF OUSTER—ESTOPPEL AGAINST SURETIES.—If an official bond, with the express and implied authority of the sureties, is approved and delivered, after the right to declare a forfeiture of the office has occurred because such bond was not filed in time, such sureties are estopped to deny the validity of the bond, on the ground that it was not filed within the time fixed by law. (Paxton v. State, 689.)

26. PUBLIC OFFICERS—PRESUMPTION.—A public officer is presumed to faithfully perform the duties with which he is charged. (Paxton v. State, 689.)

27. PUBLIC OFFICERS—CONVERSION—EVIDENCE.—In an action for the specific conversion of public money against an officer and his sureties, evidence tending to show that such officer paid his own funds into the public treasury is not admissible unless it appears that the alleged conversion occurred prior to such pay-

ment. Such payment does not answer evidence of a defalcation furnished by the official records. (Paxton v. State, 689.)

28. PUBLIC OFFICERS—DECLARATIONS AS EVIDENCE.—Public corporations act through their officers and agents, and the declarations of the latter, when made during the transaction of official business, and in relation thereto, are admissible in evidence as part of the *res gestae*. (Paxton v. State, 689.)

See Guardian and Ward.

ORDER.

See Court; Trial, 8.

ORDINANCE.

See Evidence, 12, 13; Railroad, 3-5.

PARTIES.

PARTIES—MISJOINDER OF PARTIES cannot be taken advantage of by demurrer. (Cedar Rapids Nat. Bank v. Lavery, 325.)

PARTITION.

1. PARTITION — COTENANTS — OUTSTANDING LIENS. — A bill for partition cannot be maintained by one cotenant against another, who has purchased and foreclosed outstanding mortgage liens on the common property, without tendering, or offering to pay, his proportion of the amount in redemption from the sale. (Reed v. Reed, 541.)

2. PARTITION—ATTORNEYS' FEES.—Where a defendant appears by counsel to contest a petition for partition, he should not be required to pay the counsel fees of his adversary. (Osborne v. Eslinger, 240.)

PATENT.

See Public Land, 3.

PEDDLERS' LICENSE.

See Interstate Commerce, 1, 2.

PEDIGREE.

See Evidence, 4-9.

PENSION.

1. PENSION MONEY IS EXEMPT FROM ANY LEGAL PROCESS, the purpose of which is to subject it to the debts of the pensioner, who has a right to dispose of it in any manner he sees fit. (Falkenburg v. Johnson, 369.)

2. HUSBAND AND WIFE—TRANSFER OF PENSION CHECK FROM HIM TO HER—VALIDITY OF, AS TO CREDITORS.—A check for pension money being exempt in the hands of the pensioner, its transfer by him to his wife, as her separate estate, is not fraudulent as to his creditors, although the transferee buys a note and mortgage with the money, and the husband's creditors cannot subject the note and mortgage to the payment of his debts. (Falkenburg v. Johnson, 369.)

PERPETUITIES.

1. **PERPETUITIES—MEANING OF.**—Under the rule against perpetuities a remainder over need not vest in possession within the period prescribed by the rule, and it is only necessary to avoid such rule that an interest in such remainder shall vest within the period prescribed. (*Gates v. Siebert*, 625.)

2. **PERPETUITIES.—VESTED REMAINDERS** are not within the rule against perpetuities. (*Gates v. Siebert*, 625.)

3. **PERPETUITIES—VESTING OF REMAINDER—CHILDREN.**—Under a devise to "my son and his wife, if he should marry, and after their decease to their children," the limitation over to such "children" is not within the rule against perpetuities, as upon the birth of such child an estate in remainder vests in him within the period prescribed by such rule. (*Gates v. Siebert*, 625.)

4. **PERPETUITIES—CHARITABLE TRUSTS.**—In Maryland the rule against perpetuities applies to charitable trusts as well as to any other. (*Missionary Society etc. v. Humphreys*, 432.)

5. **PERPETUITIES—DEVISE WITH NO LIMIT OF TIME—TRUST.**—A devise of property to trustees in trust to collect the rents and income and to pay the net rent to certain charities, no limit of time being placed on the duration of the trust, and the intent being to make a perpetual provision for such charities, is void as being in violation of the rule against perpetuities. (*Missionary Society etc. v. Humphreys*, 432.)

6. **PERPETUITIES—RULE AGAINST—TRUST.**—A trust authorized by a will, which requires in its execution a period longer than a life or lives in being, and twenty-one years and a fraction of a year, so that the property is inalienable during that time, creates a perpetuity and is void. (*Missionary Society etc. v. Humphreys*, 432.)

7. **PERPETUITIES—RULE AGAINST—POWER OF SALE AS AFFECTING.**—Where a devise in trust may extend beyond the time prescribed by the rule against perpetuities, the fact that the trustees are empowered to change the investments and reinvest as often as may be deemed proper, by making sales or otherwise, does not change the nature of the trust or extricate the case from the operation of the rule. The mere possibility of a continuance is decisive in determining the question of perpetuity. (*Missionary Society etc. v. Humphreys*, 432.)

PHYSICAL EXAMINATION.

See Trial, 9.

PLEADING.

1. **PLEADING—AMENDMENT—ABUSE OF DISCRETION.**—Under a statute allowing pleadings to be amended, "in furtherance of justice," the exercise of the power to permit amendments rests in the sound discretion of the court, and will not, on appeal, be disturbed for an abuse of discretion, where it had, in view of the facts, some reasonable ground to support it. The legal presumption is that there was such ground until the contrary appears. (*Illinois Steel Co. v. Budzisz*, 54.)

2. **PLEADING—AMENDMENT—IMPOSITION OF TERMS.**—The statute of Wisconsin allowing pleadings to be amended upon "such terms as may be just," does not, under all circumstances, require the imposition of terms as a condition of granting leave to

amend a pleading. If there is neither a reason for the infliction of a penalty, nor prejudice to the adverse party of any kind to be compensated for, it cannot be said, on appeal, that the failure of the trial court to impose terms was either an abuse of discretion or a violation of any rule of law. (*Illinois Steel Co. v. Budzisz*, 54.)

3. PLEADING—AMENDMENT WITHOUT IMPOSITION OF TERMS—ABUSE OF DISCRETION.—If the attorney for the defendants in ejectment fails by mistake to plead the statute of limitations for his clients, who are poor people, unacquainted with legal matters, and other attorneys are substituted, after the lapse of some twenty-one months, who at the trial offer an amended answer curing the omission, there is no abuse of discretion for the court, without the imposition of terms, to allow an amendment pleading title by adverse possession, where the only objection made to it is want of power in the court to permit it. (*Illinois Steel Co. v. Budzisz*, 54.)

4. PLEADING—REPETITION OF CAUSE OF ACTION.—In stating several causes of action, it is not necessary to repeat every general averment essential to each or common to all, but as to such matters reference may be made to distinct allegations in a preceding cause of action, thereby incorporating them in a subsequent cause of action and avoiding useless repetition. (*Ramsey v. Johnson*, 948.)

5. PLEADING—REPETITION OF CAUSE OF ACTION.—In an action to recover a personal judgment for rent accrued and due, and to enforce a lien securing it, both the debt and the lien arising under one written instrument, if the execution of the contract is fully alleged in the first cause of action, which is based upon the indebtedness, its execution is sufficiently referred to in a second cause of action based upon the lien by stating that the lien was agreed upon between the parties under the terms and conditions of said agreement of lease. (*Ramsey v. Johnson*, 948.)

6. PLEADING—CROSS-BILL.—There is no occasion for filing a cross-bill, and it may be dismissed where the relief prayed for can be properly granted under the answer to the original bill. (*New Memphis Gaslight Company Cases*, 880.)

7. PLEADING—DEFECT IN FORM—DEMURRER.—A complaint defective in form and not in substance can be attacked only by a special demurrer on the ground of uncertainty or ambiguity, and on the trial no objection is open to inquiry except the want of jurisdiction, or that it fails to state facts sufficient to constitute a cause of action. (*Eachus v. Los Angeles*, 147.)

8. PLEADING—EFFECT OF DEMURRER—ADMISSION OF WHAT.—In a suit for the specific enforcement of a contract, a demurrer to the complaint admits the existence of such contract, but not the construction placed thereon by the plaintiff. (*Ryan v. McLane*, 438.)

9. PLEADING PROVISIONS RELATING TO FRAUDULENT CONVEYANCES—SEIZURE UNDER LEGAL PROCESS.—In an answer justifying the seizure of goods under legal process, where they have been previously transferred, the pleader is not required to specifically refer to the provisions relating to fraudulent conveyances. It is sufficient to allege that the goods levied upon were the property of the person against whom the process was issued, or that he had a leviable or attachable interest therein. That portion of the statute concerning fraudulent conveyances and contracts, which is waived unless pleaded, relates to contracts which, "although pre-

viously capable of valid proof by parol evidence," are declared to be void unless in writing. (*Dearing v. McKinnon etc. Hardware Co.*, 708.)

10. PLEADING.—A PRESCRIPTIVE RIGHT cannot be shown under a plea of the general issue, but must be set up by special plea. (*Railroad v. Ferguson*, 908.)

See Evidence, 10; Lien, 2.

PLEDGE.

COLLATERAL SECURITY, HOLDER OF PROPERTY FOR. One who loans money to a corporation and receives its bonds as collateral security is a holder of such bonds for value in due course of trade, and as such entitled to protection. (*New Memphis Gas-light Company Cases*, 880.)

See Corporations, 4, 19, 20.

POLICE POWER.

POLICE POWER—REGULATION OF VOCATION.—If a vocation, naturally lawful, or the mode of exercising it, inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the state, by the exercise of its police power. (*State v. Snowman*, 380.)

See License, 1.

POWER OF ATTORNEY.

See Forgery, 1.

PRESCRIPTION.

See Pleading, 10.

PRINCIPAL.

See Criminal Law, 3, 5.

PROCESS.

See Corporations, 26, 27.

PROMISSORY NOTE.

See Receiver, 2-5.

PROXIMATE CAUSE.

See Negligence, 1.

PUBLIC LAND.

1. PUBLIC LAND—SWAMP LAND—PART OF SECTION NOT INCLUDED IN PLAT—CONCLUSIVENESS OF DETERMINATION.—Where the greater portion of a section of government land is platted and listed to a state as swamp and overflowed land, the remaining lots are government land, for their exclusion from such platting and listing is a determination to that effect. (*Bates v. Halstead*, 70.)

2. PUBLIC LANDS—SWAMP LAND—IRREGULAR PLATTING—CONCLUSIVENESS OF DETERMINATION.—ALTHOUGH AN ACT OF CONGRESS contemplates that the selection, platting,

and listing of public lands to a state as swamp and overflowed lands shall comprise only legal subdivisions of land, nevertheless a plat which divides land into legal subdivisions to a great extent, yet bounds some of its sides by an exterior meandering line, which line includes within its limits the smaller portion of some subdivisions and the larger portion of others, is a conclusive adjudication by the land department that all of the lands so platted and listed are swamp and overflowed, and that all of the lands excluded from the plat are not swamp and overflowed, but belong to the United States. (*Bates v. Halstead*, 70.)

3. PUBLIC LAND—SWAMP LAND—FEDERAL PATENT TO SMALLER PART OF LEGAL SUBDIVISION.—A patent from the United States of the smaller part of a legal subdivision of land, which part is not included in a plat to the state as swamp and overflowed land, will prevail over a state patent granting the larger part of the same legal subdivision, this part alone being platted and listed to the state as swamp and overflowed land. (*Bates v. Halstead*, 70.)

4. PUBLIC LAND—SUIT TO QUIET TITLE—MISTAKE OF LAND DEPARTMENT.—In a suit by the holder of a United States patent to quiet his title against the holder of a state patent, a mistake of the land department in the manner in which the land was platted and listed to the state cannot be reached. (*Bates v. Halstead*, 70.)

See Contract, 9.

QUIETING TITLE.

See Public Land, 4.

RAILROAD.

1. RAILROADS—INJURY TO DEAF PERSON—NEGLIGENCE.—If a deaf person walking beside a railroad track in a place of safety abruptly turns at a crossing where a flagman is stationed, and attempts to cross the track, when he is struck and injured by an approaching hand-car, the crew of which have shouted repeated warnings to him, but without attempting to stop the car, he is not entitled to recover, as, being in a place of safety up to the moment of the accident, negligence cannot be imputed either to the car crew or to the flagman in not knowing of plaintiff's deafness and in assuming that he heard and would heed the warnings shouted to him. (*Piskorowski v. Detroit etc. Ry. Co.*, 518.)

2. RAILROADS—NEGLIGENCE—SPEED OF TRAIN.—A city ordinance limiting the speed at which railroad trains may be run within its limits applies to all parts of such city, whether in or out of railroad yards therein. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

3. RAILROADS.—ORDINANCES REGULATING SPEED OF TRAINS within city limits are police regulations, and the power to thus regulate them need not be given in express terms, but may be implied from the power of the city to abate nuisances and provide for the general welfare. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

4. RAILROADS—NEGLIGENCE—VIOLATION OF MUNICIPAL ORDINANCE.—A widow is entitled to recover from a railroad company for the death of her husband caused by being run over by a train run at a greater rate of speed than is permitted

by a city ordinance, unless he was guilty of negligence contributing thereto. In such case the violation of the ordinance is negligence per se, and it is immaterial whether or not there is a contract between the railroad company and the city to comply with such ordinance, or whether the former has in fact accepted its provisions. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

5. RAILROADS—NEGLIGENCE—TRESPASSER—VIOLATION OF ORDINANCE—EVIDENCE.—In an action to recover for the death of a trespasser on a railroad track alleged to have been caused by the speed with which the train was being run in violation of a city ordinance, the burden of proof is upon the plaintiff to show that the death was caused by the excessive speed of the train, and the question whether the violation of the ordinance was the cause of the death is for the jury to determine. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

6. RAILROADS—TRESPASSERS—CARE REQUIRED OF.—The law requires of an aged trespasser upon a railroad track such degree of care and caution as is commensurate with his mental condition, and the jury should be instructed as to the degree of care required of him, and as to what lack of reason and understanding would excuse him from the effects of his own carelessness. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

7. RAILROADS—TRESPASSERS—PRESUMPTIONS.—An engineer in charge of a railroad train has the right to presume that a trespasser walking along the track is in possession of all of his faculties, and of sufficient intelligence to avoid danger; and if he is in a place of safety when the engineer first discovers him, the latter has a right to presume that he will not go upon the track in front of the approaching train, and need make no effort to stop until he discovers that the trespasser intends to, or is starting to go upon the track; but it is then his duty to use all reasonable means at his command, consistent with the safety of the train and its passengers, to avoid injuring the trespasser on the track. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

8. RAILROADS—CONTRIBUTORY NEGLIGENCE.—If an old man, impaired in mind and body, is in the habit of wandering away from home, but not into places of danger, and on a certain occasion thus wanders away and gets upon a railroad track, where he is killed by a passing train, the fact that his wife, also an aged woman, was temporarily away from home on business at the time of the accident, is not such contributory negligence on her part as prevents her from recovering for his death. (*Jackson v. Kansas City etc. R. R. Co.*, 650.)

9. RAILROADS—LIABILITY FOR SETTING FIRES—APPROVED APPLIANCES.—Under a statute relieving a railroad company from liability for fire set by a locomotive engine whose machinery, smokestack, or fire-boxes are in good order and properly managed, and if all reasonable precautions are taken, the company is not liable upon proof that the appliances used to prevent or limit the escape of sparks and fire are of such pattern as are in common use by careful, experienced, and prudent railroad operators in that kind of business at that time. (*Peter v. Chicago etc. R. R. Co.*, 500.)

10. RAILROADS—LIABILITY FOR SETTING FIRES.—A railroad company is under obligation to use the same degree of care to prevent setting out fire from its locomotives on a branch line running into a lumber district as it is on other points on its road. (*Peter v. Chicago etc. R. R. Co.*, 500.)

11. RAILROADS—LIABILITY FOR SETTING FIRES.—CONTRIBUTORY NEGLIGENCE is not available as a defense under a statute fixing the liability of railroad companies for fires set out by their locomotives, unless such defense is expressly enumerated therein. (*Peter v. Chicago etc. R. R. Co.*, 500.)

12. RAILROADS—LIABILITY FOR SETTING FIRES—NEGLECT OF PLAINTIFF.—If lumber is burned by fire, set out by a locomotive engine, the fact that the lumber was piled eight feet from the track is not such an act of negligence as prevents the owner from recovering for its loss. (*Peter v. Chicago etc. R. R. Co.*, 500.)

13. RAILROADS—LIABILITY FOR SETTING FIRES—INSURED PROPERTY.—The fact that lumber burned by fire set out by a locomotive engine was insured at the time of loss does not affect the owner's right to recover from the railroad company. (*Peter v. Chicago etc. R. R. Co.*, 500.)

See Eminent Domain.

RECEIVER.

1. RECEIVERS FOR RAILROADS—APPOINTMENT OF—INSUFFICIENT EQUIPMENT.—A court should not refuse to appoint a receiver for the road and property of a railroad company, at the instance of a judgment creditor, for the reason that the road is not sufficiently equipped to enable a receiver to properly operate it. (*Ball v. Maysville etc. R. R. Co.*, 362.)

2. RECEIVERS—AUTHORITY TO MAKE NOTES.—A receiver authorized to buy material has no implied power to execute notes in payment therefor, and he is individually liable thereon, though both parties intended to bind the maker as receiver and not individually. (*Peoria Steam Marble Works v. Hickey*, 296.)

3. RECEIVERS—LIABILITY ON NOTES.—A receiver has no principal behind him for whom he can promise and he alone is individually liable on notes executed by him as receiver without express authority, nor can such notes be reformed so as to speak the true intent of the parties. (*Peoria Steam Marble Works v. Hickey*, 296.)

4. RECEIVERS—NOTES EXECUTED BY—REFORMATION.—If one court appoints a receiver without authorizing him to execute notes, another court has no jurisdiction to reform such notes so as to make them speak the intent of the parties and bind him as receiver only. (*Peoria Steam Marble Works v. Hickey*, 296.)

5. RECEIVERS—NOTES EXECUTED BY—RATIFICATION.—An order of court confirming a receiver's report showing liability existing against the funds in his hands, but not referring to notes executed therefor, is not a ratification of the act of the receiver in executing such notes without express authority. (*Peoria Steam Marble Works v. Hickey*, 296.)

6. RECEIVERS—SALE AFTER FINAL JUDGMENT—JURISDICTION.—Where a receiver has been appointed to take charge of property pending a suit for divorce, but who does not take possession of any property, the object of his appointment and the functions invested in him terminate with the entry of final judgment, after which the court has no jurisdiction to direct the receiver to sell the property in question, to satisfy a simple money judgment for alimony. (*White v. White*, 150.)

7. RECEIVERS—POWER TO APPOINT—ENFORCE MONEY JUDGMENT.—The power of a court to appoint a receiver exists only in the cases provided by statute; hence a statute providing for such appointment "after judgment to carry the judgment into effect," applies only to cases where the judgment affects specific property, and has no application to a simple money judgment, which can be enforced by a writ of execution. (*White v. White*, 150.)

REINSURANCE.

See Insurance, 27.

RENT.

See Assignment, 1, 2.

REPLEVIN.

1. REPLEVIN AGAINST ONE WHO HAS LOST POSSESSION.—If a vendee fraudulently purchases certain chattels, he is not answerable in an action of replevin for their recovery, where, prior to a demand for their return, and before the commencement of the action, they are taken from him by process legal as to him, such as a writ of execution, and not by any voluntary act on his part. (*Sinnott v. Feiock*, 736.)

2. REPLEVIN—MATTER IN ISSUE—DAMAGES.—In an action of replevin the inquiry is as to property in possession and wrongfully withheld at the time of the commencement of the suit, and there can be no recovery of damages for any property which the defendant did not have or control at such time. (*Burr v. McCallum*, 677.)

RES JUDICATA.

See Judgment, 3-7; Marriage and Divorce, 7.

REVENUE LAW.

1. INTERNAL REVENUE ACT—FAILURE TO STAMP ASSIGNMENT OF MORTGAGE.—An assignment of a mortgage, from which the proper revenue stamps have been inadvertently omitted at the time it was made, is not thereby rendered void under the internal revenue act, which provides that such instruments shall be invalid and of no effect if the person who transfers them has omitted to stamp them with intent to evade the provisions of the act, since such provision applies only to those instruments on which stamps have been omitted with intent to evade the law, and does not relate to an innocent failure to stamp an instrument. (*Wingert v. Zeigler*, 453.)

2. INTERNAL REVENUE ACT—FAILURE TO STAMP INSTRUMENT—EFFECT OF SUBSEQUENT STAMPING.—Under the internal revenue act, the record of the assignment of a mortgage is not void by reason of not being stamped, but is only prohibited from being used in evidence before it is stamped, and when that is done by the collector, upon being satisfied that the stamp was omitted through inadvertence and not willfully, and the clerk has noted that fact upon the original record as authorized by the act, the right to use the assignment is restored, and relates back to the time it was made, subject only to rights acquired in good faith in the meantime, and consequently a sale under such assignment is valid and enforceable. (*Wingert v. Zeigler*, 453.)

REVIVOR OF SUIT.

See Marriage and Divorce, 4, 5.

RULE IN SHELLEY'S CASE.

See Wills, 14-16.

SALE.

See Damages, 7-9.

SETTING FIRES.

See Negligence, 2; Railroads, 9-12.

SHEEP-KILLING DOG.

See Animals.

SHELLEY'S CASE.

See Wills, 14-16.

SPECIAL VERDICT.

See Trial, 6, 7.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—PURCHASE OF CORPORATE STOCK—PRIOR VALID POOLING AGREEMENT.—A contract for the purchase of corporate stock, made subject to the provisions of a prior pooling agreement which declares that no sale shall be made without the concurrence of the holders of three-fourths of the pooled stock, cannot be specifically enforced even if the pooling agreement is valid, where such contract of sale has never been concurred in by the holders of three-fourths of the pooled stock. (Ryan v. McLane, 438.)

2. SPECIFIC PERFORMANCE—PURCHASE OF CONTROLLING INTEREST IN CORPORATION—SELLERS ACTING FOR OTHER STOCKHOLDERS.—A contract for the purchase of the stock of a quasi public corporation, whose object is to gain the control of such corporation, where the sellers are a committee representing themselves and all other stockholders who join them by a certain date, and the contract contemplates a purchase of all the stock pooled, and shows on its face an intention to protect all the stockholders, and the purchaser knows that the sellers are acting for the benefit of all the stockholders, and that they have no authority to sell without the consent of the holders of three-fourths of the stock for whom they were acting, such contract cannot be specifically enforced against the sellers representing merely the stock which they held at the time the contract was made, since this would be inequitable and unreasonable. (Ryan v. McLane, 438.)

3. SPECIFIC PERFORMANCE RESTS IN THE SOUND DISCRETION of a court of equity. It is a matter of grace and not of right, and will never be decreed where the equity of the case is not clear. (Ryan v. McLane, 438.)

4. SPECIFIC PERFORMANCE—PURCHASE OF STOCK IN CORPORATION—PRIOR POOLING AGREEMENT—MUTUALITY.—Where a contract for the purchase of all the stock of a corporation which shall be pooled by a certain date is made with

knowledge of and reference to a prior pooling agreement between the sellers and other stockholders to the effect that no stock should be sold without the concurrence of the holders of three-fourths of the stock held by the signers of the pooling agreement, the sellers being a committee representing the other stockholders, and where the purchaser makes a deposit with the committee which is to be forfeited in case he fails to accept and pay for all such pooled stock within forty days, such agreement is not an absolute contract of purchase and sale, but a mere offer or option, which cannot be specifically enforced for want of mutuality. (*Ryan v. McLane*, 438.)

5. SPECIFIC PERFORMANCE—PURCHASE OF CORPORATE STOCK—PRIOR VOID POOLING AGREEMENT.—A contract for the purchase of corporate stock, made subject to the provisions of a prior pooling agreement, cannot be specifically enforced if such pooling agreement is declared void, as it would be inequitable to enforce it. (*Ryan v. McLane*, 438.)

STAMP.

See Revenue Law.

STATUTE.

1. STATUTES.—IN THE INTERPRETATION of a statute recourse is properly had to the decisions of the courts which have placed a construction upon it in the state in which it is enacted. Such decisions are deemed essentially part of the law itself. (*Lamberton v. Grant*, 415.)

2. STATUTES—CONSTRUCTION.—If plain and unambiguous words or phrases are employed in a statute, they should not be restricted in their operation by reference to the policy of the law, unless that policy is clearly indicated in the act itself. (*First Nat. Bank v. Ludvigsen*, 928.)

See Constitutional Law.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—PAROL AGREEMENT CONCERNING LAND—PART PERFORMANCE.—A parol agreement by parents to deed their farm to their son, subject to their life estate, if he will surrender a lease held by him and come to live with them, is taken out of the statute of frauds by his accepting such offer and performing the conditions imposed by the contract. (*Pike v. Pike*, 488.)

2. CONTRACTS.—THE STATUTE OF FRAUDS is as applicable to executory as to executed contracts. (*Weeks v. Crie*, 410.)

3. CONTRACTS—STATUTE OF FRAUDS.—If there are two separate contracts for the sale of different articles, the acceptance and receipt of one of the articles do not take the contract for the other out of the statute of frauds; but if there is but one contract for the sale of the two articles, negotiated it may be successively, delivery and acceptance of one of the articles takes the other out of the statute. (*Weeks v. Crie*, 410.)

4. CONTRACTS—STATUTE OF FRAUDS.—ACCEPTANCE and receipt of part of the articles purchased under one contract of sale, or of all of one class of articles so purchased, necessarily takes the whole contract out of the statute of frauds. (*Weeks v. Crie*, 410.)

5. CONTRACTS—STATUTE OF FRAUDS.—The application of the statute of frauds in the case of the purchase of a number of articles at the same transaction depends upon whether there is one contract or more, in many instances, and the fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time and place, or in the conduct of the parties, that the whole may be fairly considered as one transaction. (*Weeks v. Crie*, 410.)

See Vendor and Vendee, 1-4.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

SUBROGATION.

See Insurance, 17-22.

SUNDAY.

1. SUNDAY—GAMES—BASEBALL.—A statute making it a misdemeanor to be guilty of horseracing, cock fighting, or playing at cards or games of any kind on Sunday does not include the game of baseball. (*Ex parte Neet*, 638.)

2. SUNDAY—GAMES—BASEBALL.—Athletic games and sports, such as baseball, on Sunday, are not unlawful unless expressly declared to be so by statute. (*Ex parte Neet*, 638.)

See Habeas Corpus, 2.

SURETYSHIP.

See Corporations, 18; Guaranty; Guardian and Ward; Mechanic's Lien, 6; Officers, 1-22.

SWAMP LAND.

See Public Land.

TAXATION.

1. TAXATION—SPECIAL ASSESSMENTS—EFFECT OF PAYMENT.—A special assessment is a charge upon the specific land benefited, and not against the owner thereof. The payment of such assessment, even through mistake and by one having no interest in the land, discharges both the land and the owner from further liability thereon. (*Hudson v. People*, 166.)

2. TAXATION—SPECIAL ASSESSMENT—EFFECT OF PAYMENT.—If payment of a special assessment is voluntarily made to the collector, even by one who has no interest in the land, the collector has no power to hear evidence and decide whether the assessment was paid deliberately and with a full knowledge of the facts, or under some mistake or misapprehension. (*Hudson v. People*, 166.)

3. TAXATION—SPECIAL ASSESSMENTS—RESTORATION AFTER PAYMENT.—If a special assessment has been voluntarily paid, even through mistake, by one who has no interest in the land, and such payment has been received by the county officers, the assessment is discharged by the payment, and it cannot be revived or restored and the land rendered subject to sale by the act of the county officers in refunding the money paid, canceling

the entry of payment, and destroying the receipt therefor. Such payment voluntarily made cannot be recovered. (*Hudson v. People*, 166.)

See Municipal Corporation, 17, 21, 22.

TELEGRAPH COMPANY.

1. TELEGRAPH COMPANIES—DEGREES OF NEGLIGENCE—FINDING.—Degrees of care and of negligence are recognized in California; and in a suit to recover damages for a mistake in the transmission of a telegraphic message, a finding that the telegraph company was not guilty of any negligence whatever is equivalent to an express finding that such company used great care in the transmission and delivery of the message, within the meaning of a statute requiring a carrier of messages to use great care and diligence in their transmission and delivery. (*Coit v. Western Union Tel. Co.*, 153.)

2. TELEGRAPH COMPANIES—LIMITATION OF LIABILITY—UNREPEATED MESSAGE.—The sender of a telegraphic message is bound by a stipulation contained in a written message that the telegraph company will not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of an unrepeated message, and in such case he can recover only where the company is guilty of willful misconduct or gross negligence in the performance of its duty. (*Coit v. Western Union Tel. Co.*, 153.)

3. TELEGRAPH COMPANIES—LIMITING LIABILITY—CONTRACT BINDING ON RECEIVER OF MESSAGE.—Where the sender of a telegraphic message acts as the agent of the receiver, the contract made by the sender with the telegraph company is binding on the receiver of the message. (*Coit v. Western Union Tel. Co.*, 153.)

4. TELEGRAPH COMPANIES—ACTION BY RECEIVER OF MESSAGE—CONTRACT OR TORT.—Where no question of privity of contract arises between the sender and the receiver of a telegraph message, the receiver may rest his right of action against the telegraph company on tort for a breach of public duty; but where the receiver is a party to a special contract, either directly or indirectly through the sender as his agent, and brings his action against the company, he must stand upon his contract rights. (*Coit v. Western Union Tel. Co.*, 153.)

5. TELEGRAPH COMPANIES—GROSS NEGLIGENCE—ATMOSPHERIC DISTURBANCE.—A finding that a telegraph company was not guilty of gross negligence in sending a message will not be disturbed, where the mistake was occasioned by atmospheric disturbances, but the wire was otherwise in good working order, and more than two hundred messages were correctly sent the same night; the mere fact that a storm was raging over the route will not of itself establish gross negligence in attempting to forward a message. (*Coit v. Western Union Tel. Co.*, 153.)

TORT.

See Action, 2; Conversion.

TRADEMARK.

See Labor Union.

TRADE NAME.

1. **TRADEMARKS—TRADE NAMES.**—The name of an artist, author, musician, or lawyer is not regarded as a trade name, and, as such, salable or assignable. (*Blakely v. Sousa*, 821.)

2. **TRADE NAMES—BANDMASTER.**—The representative of a deceased musical manager under whom a celebrated bandmaster was engaged during his lifetime has no right to the use of such bandmaster's name after the death of such manager. (*Blakely v. Sousa*, 821.)

TRADE UNION.

See Labor Union.

TRESPASSER.

See Railroads, 5, 6.

TRIAL.

1. **TRIAL—IMPANELING JURY.**—It is not a prejudicial error to remove a juror on a peremptory challenge after a refusal to discharge him on a challenge for cause, where no objection is made to the jury as finally impaneled. (*Bergman v. Hendrickson*, 47.)

2. **JURORS — DISQUALIFICATION — DEPUTY SHERIFFS.**—A sheriff, whose salary is paid out of fees earned and collected, has such a pecuniary interest in securing convictions in criminal cases that his deputies, as his employes, are not competent to serve as jurors in such cases. (*Gaff v. State*, 235.)

3. **JURORS -- COMPETENCY—CHALLENGE FOR CAUSE—CONSTITUTIONAL GUARANTY.**—Although a statute professes to give all the grounds of challenging jurors for cause, the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent. (*Gaff v. State*, 235.)

4. **TRIAL BY JURY—BASIS FOR CHALLENGE.**—In impaneling a jury called to try an action, defended upon the ground that the acts complained of were done in pursuance of the by-laws of a liverymen's union, to which the defendants belonged, the jurors may properly be asked, as a basis for challenge, whether they are biased against unions. (*Gatzow v. Buening*, 17.)

5. **TRIAL—IMPANELING JURY—WAIVER OF OBJECTIONS.** A failure to object to a collected jury waives any objections to the improper exclusion of questions put to them on their examination. (*Gatzow v. Buening*, 17.)

6. **TRIAL.— THE RIGHT TO A SPECIAL VERDICT IS ABSOLUTE,** under the Wisconsin statute, if requested before argument to the jury, and it is the duty of the trial court to prepare its form. Hence, if a special verdict is requested, before any argument to the jury, it is error for the court to shift such duty to the moving party and then to deny his motion as coming too late, where it is renewed at the close of argument and questions are submitted for the approval of the court. (*Gatzow v. Buening*, 17.)

7. **TRIAL—DENIAL OF REQUEST FOR SPECIAL VERDICT.** It is not material error, when the facts admitted or established beyond a reasonable controversy by the evidence leave nothing to submit to the jury except the amount of the damages, to deny a request for a special verdict. (*Gatzow v. Buening*, 17.)

8. MOTIONS AND ORDERS—REVIVAL OF ACTION, ORDER: AS TO—NECESSITY OF COURT'S SIGNATURE—OBJECTION—VALIDITY OF.—An order that a suit be revived should be signed by the court, but if signed by the attorneys, it will be treated as if signed by the court where, upon the showing made, the court would have granted the order as of course. Hence, an objection first made upon the trial, when the plaintiff seeks to make out his case, that the testimony cannot be received, because the suit has not been revived, should be overruled, where the defendant made no objection when the new declaration was filed and pleaded only the general issue. (*Ferguson v. Wilson*, 543.)

9. TRIAL—PHYSICAL EXAMINATION OF PLAINTIFF—REFUSAL OF, NOT ERROR, WHEN.—The plaintiff in an action for damages for permanent injuries to his person may, in the discretion of the court, be required to submit to a medical examination by experts, in cases where discovery of the truth will more likely result with than without the examination, and the ends of justice be thereby better subserved; but there is no error in refusing the defendant's request to have the plaintiff's person examined by competent physicians and surgeons selected by the defendant, where a witness and physician has already made an examination, and where a more certain ascertainment of the facts could not be elucidated by any further expert examination. (*Belt Electric Line Co. v. Allen*, 374.)

10. TRIAL—EVIDENCE—PLEADING.—Plaintiff must establish his case by a preponderance of evidence, and defendant cannot be deprived of his right to compel him to do so by an amendment of the petition after trial and verdict. (*Omaha Bottling Co. v. Thieler*, 673.)

11. TRIAL—CRIMINAL CASES—JUDGE CANNOT DIRECT VERDICT.—A trial judge cannot compel a verdict of guilty in a felony case by instructing the jury that it is their duty to return such a verdict, when some of the jurors are not willing to do so. He cannot, in so many words, direct them to bring in a verdict of guilty. Hence, it is reversible error to instruct the jury to return such a verdict; that there is nothing else for them to do; and that any individual juror who sets himself up against the plain instruction of the court violates his oath as a juror. (*People v. Warren*, 582.)

TROVER.

See Conversion.

TRUSTS.

1. TRUST FUNDS—IDENTITY—CLAIM AGAINST ESTATE OF DECEASED PERSON.—The beneficiary of a trust fund held by a decedent, who is able to identify such fund, may enforce the trust without presenting his claim against the estate within the time required by law. (*Byrne v. McGrath*, 127.)

2. TRUST FUND—IDENTIFICATION—INVESTMENT IN DRUG BUSINESS.—In a suit to enforce a trust, evidence that the trustee employed the trust fund of two thousand five hundred dollars, to which was added five hundred dollars of his own, in the purchase of a drug store, stock, and fixtures, and that the business was carried on at a profit until the trustee's death, sufficiently identifies the trust fund, and a contrary finding by the trial court is against the evidence. (*Byrne v. McGrath*, 127.)

3. TRUST FUND—ADVANCEMENT BY FATHER—MINGLING OF FUNDS.—Where a father, who holds two thousand five hundred dollars in trust for the support of his children, adds thereto five hundred dollars of his own money and invests the whole in a drug business, the father's investment, if not deemed an advancement, simply gives him an undivided interest in the concern, or, if considered as a mingling of his property with trust funds, the whole belongs to such fund on the principle of accession. (*Byrne v. McGrath*, 127.)

4. TRUST FUND — WHAT CONSTITUTES — IDENTIFICATION—DRUG BUSINESS.—Where trust funds have been invested in a drug business, the question of identity does not relate to the specific items of stock and fixtures constituting the drug store at the time of the purchase, but to the drug store itself, which is to be regarded collectively as a thing or entity distinct from the material things momentarily constituting it. (*Byrne v. McGrath*, 127.)

5. TRUST FUND—RIGHT OF BENEFICIARY AS AGAINST CREDITOR.—Beneficiaries of a trust fund held by a deceased trustee, and which has been identified, may enforce such trust against the administrator, and a general creditor of the deceased, who gave him credit upon the belief that he owned the trust property, has no equities superior to theirs, and cannot object to its enforcement. (*Byrne v. McGrath*, 127.)

6. TRUST — DEATH OF TRUSTEE — APPOINTMENT OF NEW TRUSTEE.—Where property is held by a father in trust for the maintenance, support, and education of his children, the trust does not terminate with the father's death, and a new trustee will be appointed to take charge of the trust fund. (*Byrne v. McGrath*, 127.)

7. TRUST — WILL — REMAINDER UNDISPOSED OF—SUCCESSION.—Where a wife by her will leaves property to her husband in trust for the maintenance, support, and education of their children, the remainder, not being disposed of by such will, passes by intestate succession one-third to the father and two-thirds to the children. (*Byrne v. McGrath*, 127.)

8. TRUST DEEDS—GRANTOR RESERVING RIGHT TO SELL—WHETHER VITIATE DEED.—A mortgage or trust deed which reserves to the mortgagor the right to sell or exchange the property covered by the conveyance when deemed expedient is not vitiated by such reservation, since this power does not involve the power to convey, which is alone in the trustee, and a complete conveyance can be made only by the trustee and for the purposes of the trust. (*New Memphis Gaslight Company Cases*, 880.)

See Municipal Corporations, 1; Perpetuities.

TRUST DEED.

See Trust, 8.

UNDUE INFLUENCE.

See Wills, 3-5.

UNLAWFUL COMBINATION.

See Monopoly.

VACCINATION.

See Board of Health, 3.

VENDOR AND VENDEE.

1. VENDOR AND PURCHASER—STATUTE OF FRAUDS—PAROL SALE OF LANDS—IMPROVEMENTS.—One who enters upon land under a parol contract to convey, and who places valuable and permanent improvements thereon, has an equitable cause of action against the vendor who repudiates the contract and refuses to convey. While such contract cannot be specifically enforced, the vendor is liable to the vendee for the value of the improvements. (*Luton v. Badham*, 783.)

2. VENDOR AND PURCHASER—PAROL SALE OF LANDS—RECOVERY FOR IMPROVEMENTS—POSSESSION.—The right of a purchaser who has entered upon land under a parol contract and made valuable and permanent improvements to enforce payment for such improvements is based upon fraud, and not upon possession; hence a purchaser may recover the value of such improvements even though he is out of possession. (*Luton v. Badham*, 783.)

3. VENDOR AND PURCHASER—PAROL CONTRACT—IMPROVEMENTS—EVIDENCE.—That a person was induced to place valuable permanent improvements upon land by reason of a promise to convey the same to him, may be proved by parol evidence when the vendor denies the contract. (*Luton v. Badham*, 783.)

4. STATUTE OF FRAUDS—PAROL CONTRACT TO SELL LAND—PLEADING.—A parol contract for the sale of land is not a void contract, but voidable, and in a suit to enforce it the vendor may avoid it either by pleading the statute of frauds or denying the contract. (*Luton v. Badham*, 783.)

See Statute of Frauds, 1.

VERDICT.

See Trial, 6, 7, 11.

WAGERING CONTRACT.

See Negotiable Instrument, 6.

WAGES.

See Constitutional Law, 22.

WAREHOUSEMAN.

1. WAREHOUSE RECEIPT—CONTRACT TO RETURN WHEAT—DAMAGE BY THE ELEMENTS—ACT OF GOD.—A warehouse receipt, by the terms of which a defendant promises to return the wheat stored upon the surrender of such receipt, "damage by the elements excepted," imposes an absolute liability to return the wheat, unless prevented from so doing by the act of God, "damages by the elements" being the equivalent of the phrase "act of God." (*Pope v. Farmers' Union etc. Co.*, 87.)

2. WAREHOUSE RECEIPT—DAMAGE BY THE ELEMENTS—NEGLIGENCE.—Under a contract to return wheat absolutely, damage by the elements excepted, it is no defense for a defendant to show that the wheat was destroyed without negligence upon his part, but he must show that the wheat was in fact destroyed or damaged by the elements. (*Pope v. Farmers' Union etc. Co.*, 87.)

WATERS AND WATERCOURSES.

1. **NAVIGABLE STREAMS.**—A river which is in fact navigable at certain seasons of the year during good tides to light draught boats is a navigable stream, whether it has been declared so by the legislature or not. (*Railroad v. Ferguson*, 908.)

2. **NAVIGABLE STREAMS—BRIDGES.**—A STATE LEGISLATURE may authorize the construction of a bridge over a stream entirely within the limits of the state, notwithstanding such bridge might work inconvenience to the right of navigation. (*Railroad v. Ferguson*, 908.)

3. **NAVIGABLE STREAMS — BRIDGES — OBSTRUCTING NAVIGATION.**—Under a general authority to build bridges over streams, a railroad must so construct its bridges as not to interfere unnecessarily with the navigation of the streams. (*Railroad v. Ferguson*, 908.)

4. **NAVIGABLE STREAMS—RIGHT TO OBSTRUCT—PRESCRIPTION.**—The right to obstruct a navigable stream by means of an unauthorized railroad bridge cannot be acquired by prescription. (*Railroad v. Ferguson*, 908.)

5. **NAVIGABLE STREAMS—QUESTION OF FACT.**—The question of the navigability of a stream is one of fact, to be determined by the jury. (*Railroad v. Ferguson*, 908.)

6. **NAVIGABLE STREAMS—TITLE BETWEEN HIGH AND LOW WATER MARK.**—If a navigable stream is made the boundary by the state, the title passes to low-water mark, with the qualification that between high and low water mark the grantee can use the land for his own private purposes, provided that, in such use, he does not interfere with the public rights of navigation, fishery and improvement of the stream. (*Freeland v. Pennsylvania R. R. Co.*, 850.)

7. **ALLUVION IS AN ACCUMULATION OF SAND,** earth, and loose stones or gravel brought down by a river, which, when spread out to any extent, forms what is called alluvial land. It is an addition made to the land by a washing of the seas or rivers, and its chief characteristic is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time. (*Freeland v. Pennsylvania R. R. Co.*, 850.)

8. **ALLUVION.—A RIPARIAN OWNER ON A NAVIGABLE STREAM HAS A RIGHT** to remove and sell sand which has been deposited as alluvion between high and low water mark on the banks of a stream, as against a railroad company, which, for its own purposes and not for the improvement of the stream, erects an obstruction on the opposite bank so as to change the current and sweep away the sand and prevent all future alluvion. In such case the riparian owner is entitled to recover damages, both for the sand thus swept away and for the loss of future alluvion. (*Freeland v. Pennsylvania R. R. Co.*, 850.)

See Irrigation.

WILLS.

1. **WILLS—PUBLICATION—ATTESTATION.**—If a will is read over in the presence and hearing of the testator and the subscribing witnesses, and he says that "that is all right," and signs his name thereto, and such witnesses sign their names thereto as witnesses, this is equivalent to a formal publication and attestation of the will. (*Schlerbaum v. Schemme*, 604.)

2. WILLS — MENTAL CAPACITY — EVIDENCE.—If the subscribing witnesses to a will testify that the testator was of sound mind at the time of its execution, the trial court should withdraw the issue of mental incapacity from the jury by a peremptory instruction in the absence of substantial evidence to the contrary. (*Schierbaum v. Schemme*, 604.)

3. WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—If a will is shown to have been executed according to law by a person of sound mind, the burden of proving that it is the result of fraud and undue influence is upon the contestant who makes the charge, and the mere fact that it apparently unjustly discriminates against one of the testator's children, in favor of another, does not shift the burden of proof on that other to account therefor. A man has the right to will his property to whomsoever he chooses, and the beneficiary is not bound to account for his choice. (*Schierbaum v. Schemme*, 604.)

4. WILLS—UNDUE INFLUENCE—EVIDENCE.—Undue influence in the execution of a will cannot be presumed from a mere coincidence of opportunity to influence, but affirmative proof of such undue influence is required to be made, either by direct facts shown, or of facts or circumstances, from which undue influence results as a reasonable and fair inference, and not as a mere conjecture. (*Schierbaum v. Schemme*, 604.)

5. WILLS—UNDUE INFLUENCE.—DECLARATIONS OF THE TESTATOR after making the will as to the causes which induced him to make it are incompetent, and should be rejected as hearsay on the issue of fraud or undue influence in the execution of the will. (*Schierbaum v. Schemme*, 604.)

6. WILLS—EVIDENCE.—ADMISSIONS OF DEVISEE are not admissible in evidence against another devisee claiming under the same will. (*Schierbaum v. Schemme*, 604.)

7. WILLS—DISCRETIONARY POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.—In order that a power of sale contained in a will shall pass to the administrator with the will annexed, it must be for an administrative purpose, and not to execute a collateral trust. A discretionary power of sale given by a foreign will to an executor named therein does not pass to an administrator with the will annexed so as to authorize a sale of lands without authorization of the probate court, and for a purpose not administrative. And this is true, although by the law of the state of the domiciliary administration an administrator with the will annexed is given the same power to sell lands as the person named in the will as executor. (*Crouse v. Peterson*, 89.)

8. WILLS—EQUITABLE CONVERSION OF LAND INTO MONEY.—IN CALIFORNIA, the fact that both the real and personal estate of a testator is distributed as one fund raises no presumption of an equitable conversion of land into money, since both species of property descend by the same rule and the executor and the probate court have the same control over each. (*Crouse v. Peterson*, 89.)

9. WILLS—POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.—Where a direction contained in a will to sell land is imperative, but discretion is given as to the time of sale, or the terms, or price, the power passes to the administrator with the will annexed. (*Crouse v. Peterson*, 89.)

10. WILLS—CHILDREN—VESTED REMAINDER.—Under a devise to an unmarried "son, and his wife, if he should marry, and

after their decease to their children," the word "children" constitutes a class in whom the remainder vests, the individual share of each child being subject to diminution or increase as births or deaths may occur. (*Gates v. Siebert*, 625.)

11. **WILLS—CHILDREN.**—The word "children," used in a will, means legitimate children, unless something else appears to indicate that a different meaning is intended. (*Gates v. Siebert*, 625.)

12. **PARENT AND CHILD—RIGHTS OF LEGITIMATE CHILD UNDER WILL.**—Under a statute which makes a child born before the marriage of its parents, who afterward marry, and it receives the recognition of its father, legitimate, it is entitled to share with other offspring born of the marriage under a devise to such father's "children." (*Gates v. Siebert*, 625.)

13. **WILLS—RIGHT OF LEGITIMATED CHILD.**—If a testator devises land to his unmarried son and his wife, if he should marry, and after their decease to their children, and such son's first wife, after giving birth to a child, dies, followed by the death of such child, after which the son marries again, and in so doing recognizes and legitimatizes a child born to his second wife before their marriage, such child becomes one of the children of the testator's son within the meaning of the will, and the estate in remainder reopens and lets in such child and the after-born children of the second marriage. (*Gates v. Siebert*, 625.)

14. **WILLS—RULE IN SHELLEY'S CASE.**—If there appears on the face of a will sufficient to show that the word "issue" was intended to have a less extended meaning than that of a word of limitation, and to be applied only to children or to descendants of a particular class at a particular time, it must be construed as a word of purchase and not of limitation. (*McCann v. McCann*, 846.)

15. **WILLS—RULE IN SHELLEY'S CASE.**—A devise of land to a son for his natural life, and "at his death to his next nearest blood relations, share and share alike," creates only a life estate in such son, if the other provisions of the will indicating a general scheme of distribution show that the testator did not intend to use the words "nearest blood relations," as meaning heirs generally. (*McCann v. McCann*, 846.)

16. **WILLS—RULE IN SHELLEY'S CASE.**—To bring a devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or in tail as a nomen collectivum for the whole line of inheritable blood. If the testator annexes words of explanation to heirs, or heirs of the body, as to heirs now living, or the like, using the term as mere descriptio personarum, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given, and they take as purchasers. (*McCann v. McCann*, 846.)

See Perpetuities.

WITNESS.

1. **WITNESSES — SUIT AGAINST ADMINISTRATOR — EVIDENCE.**—Under a statute providing that in actions against administrators neither party can testify against the other "as to any transactions with or statements by the testator," a plaintiff may testify that he has a letter in his possession and that the letter is in the handwriting of the deceased, since these are independent facts and do not constitute transactions with or statements by the deceased. (*Minnis v. Abrams*, 913.)

2. WITNESSES—CROSS-EXAMINATION—CONVERSATION.—If a witness, on his examination in chief, testifies as to part of a conversation, or as to part of a transaction, the whole conversation or the whole transaction may properly be shown on cross-examination. (*People v. Warren*, 582.)

3. CRIMINAL LAW—REBUTTAL EVIDENCE—IMPEACHMENT.—Where a defendant testifies on cross-examination that he never had a particular conversation with certain individuals, rebuttal testimony to the effect that he did have such conversation is admissible for the purpose of impeachment. (*People v. Rushing*, 141.)

4. CRIMINAL TRIAL—FAILURE OF DEFENDANT TO EXAMINE WITNESS.—An attorney for the prosecution may comment before the jury on the failure of the defendant to examine a witness which he had subpoenaed for himself. (*State v. Costner*, 809.)

5. CRIMINAL TRIAL—FAILURE TO CALL WITNESSES—COMMENT BY ATTORNEY.—In a prosecution for burglary, where there is some evidence that the defendant, about the hour of the burglary, went to the house of one of the state's witnesses and spent the balance of the night, the attorney for the prosecution may properly comment before the jury on the failure of the defendant to call a witness to show where he spent the night. (*State v. Costner*, 809.)

6. EVIDENCE—CONTRACTS.—It is not competent for a witness to testify that a certain contract was or was not made. He may state what was said or done and the conclusion is for the court or for the jury. (*Durlacher v. Frazer*, 918.)

See Evidence.

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